

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

LEAGUE OF WOMEN VOTERS OF
VIRGINIA; KATHERINE D.
CROWLEY; ERIKKA GOFF; and
SELJRA TOOGOOD,

Plaintiffs,

v.

VIRGINIA STATE BOARD OF
ELECTIONS; ROBERT H. BRINK,
JOHN O'BANNON, and JAMILAH D.
LECRUISE, in their official capacities as
Chairman, Vice-Chair, and Secretary of
the Virginia State Board of Elections,
respectively; and CHRISTOPHER E.
PIPER, in his official capacity as
Commissioner of the Virginia Department
of Elections,

Defendants.

Case No. 6:20-cv-00024-NKM

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

COVID-19 has upended our lives in ways few of us could have predicted just weeks ago. But individuals must maintain their fundamental right to vote in these extraordinary times. This case concerns a requirement that threatens thousands of Virginians' right to vote during this pandemic—Virginia's witness requirement for absentee ballots, the rule that voters submitting mail ballots must have another individual observe them open their ballot envelope, and then sign as a witness on the voter's envelope.

In normal times, the witness requirement was an ineffectual policy, but perhaps only a minor-to-moderate burden on the right to vote. During the pandemic, however, it will force thousands of voters to choose between disenfranchisement and placing their health at grave risk. Indeed, approximately one-quarter of Virginians of voting age—more than one million people, including individual Plaintiffs and some members of the League of Women Voters of Virginia (the "League")—live by themselves. The witness requirement will require them to do precisely the opposite of what the Commonwealth has demanded in the current public health emergency. The Governor has ordered the closure of all schools and non-essential businesses, and has issued a statewide "Stay at Home" order,¹ advising all Virginians to minimize "human-to-human contact" and to "practice social distancing" in light of the ongoing "public health crisis."² But the witness requirement will require many thousands of Virginia voters to flout that order, and venture from the safety of their homes in search of another adult willing to come in close enough

¹ Va. Exec. Order No. 2020-55 (Mar. 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

² Press Release, Ralph Northam, Governor of Virginia, Governor Northam Issues Statewide Stay at Home Order (Mar. 30, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855702-en.html>.

physical proximity to witness and sign their absentee ballots. As explained by Plaintiffs' expert Dr. Arthur Reingold—Head of Epidemiology and Biostatistics at the University of California at Berkeley—such person-to-person interaction carries substantial risks of exposure to and/or transmission of COVID-19.

Plaintiffs are thus likely to succeed on their claim that the witness requirement unconstitutionally burdens the fundamental right to vote. Without a preliminary injunction, thousands of Virginia voters—including individual Plaintiffs Goff and Toogood and a number of League members—will be forced to choose between accepting disenfranchisement or violating the social distancing rules that the Commonwealth itself has determined are critical to preserving public health. That amounts to a severe burden on the right to vote, meriting at least heightened, if not strict, scrutiny, which the witness requirement cannot survive. The witness requirement does little if anything to serve the government interest of election integrity, let alone in an appropriately tailored manner to justify the impending and irreparable harm that it will wreak on Virginia voters. It imposes an undue burden on the right to vote and is therefore unconstitutional.

Finally, the balance of the equities and the public interest also support a preliminary injunction, which will both vindicate the dual public interests of ensuring all qualified voters can vote in June and protecting public health with little if any burden on Defendants. This Court must evaluate the witness requirement in light of the present and impending circumstances that Plaintiffs and other Virginia voters face. Without relief, thousands of Virginia voters will be forced to risk their health in order to vote—or simply not have their voices heard at all. Plaintiffs therefore request the Court grant a preliminary injunction against the witness requirement for the June 23 primary, and for any and all subsequent elections in Virginia until such time as in-person

interactions required by compliance with the witness requirement no longer pose a risk to public health and personal safety.

FACTUAL BACKGROUND

A. The COVID-19 Pandemic

The “United States is now the ‘epicenter’ of the global [COVID-19] pandemic and has far more confirmed COVID-19 cases than any other nation.”³ As Plaintiffs’ expert Dr. Arthur Reingold explains in his testimony, the novel coronavirus, SARS-CoV-2, causes individuals to contract COVID-19, a disease that is now a global pandemic.⁴ Declaration of Dr. Arthur Reingold ¶ 7 (attached as Ex. A). Dr. Reingold is a medical doctor, a public health expert in the area of infectious diseases and epidemiology, and the Division Head of Epidemiology and Biostatistics at the University of California, Berkeley, School of Public Health. Reingold Decl. ¶¶ 1, 3. He spent eight years at the Centers for Disease Control and Prevention (“CDC”), has directed or co-directed the CDC-funded California Emerging Infections Program for more than 25 years, and was previously the President of both the Society for Epidemiologic Research and the American Epidemiological Society. *Id.* ¶ 1.

COVID-19 spreads mainly from person-to-person through close contact with one another and through respiratory droplets when an infected person coughs or sneezes.⁵ Medical experts are continuing to learn more about the ease with which the COVID-19 spreads, including

³ General Order No. 2020-11, *In re: Court Operations Under the Exigent Circumstances Created by the Outbreak of Coronavirus Disease (COVID-19): Temporary Policy for Remote Proceedings and Public Access to Such Proceedings*, Case No. 2:20mc7 (E.D. Va. Apr. 6, 2020).

⁴ Betsy McKay et al., *Coronavirus Declared Pandemic by World Health Organization*, Wall Street Journal, Mar. 11, 2020, <https://www.wsj.com/articles/u-s-coronavirus-cases-top-1-000-11583917794>.

⁵ Centers for Disease Control and Prevention, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 6, 2020).

whether it is “aerosolized, such that tiny droplets containing the virus remain in the air and can be inhaled by others who come into contact with that air.” Reingold Decl. ¶ 8.⁶ Recent studies also indicate that people infected with the virus may transmit it to others even without showing symptoms themselves.⁷

COVID-19 can cause severe consequences, including long-term illness and death. Reingold Decl. ¶ 7. The World Health Organization (WHO) estimates that approximately 20 percent of those infected by COVID-19 require hospitalization.⁸ Estimates from early March put the fatality rate for people infected with COVID-19 at approximately ten times higher than influenza even in a severe season and including in countries with advanced health care systems.⁹ Top scientists recently estimated that COVID-19 could kill between 100,000 and 240,000 Americans, with an even higher number possible if Americans do not follow strict social distancing guidelines.¹⁰

COVID-19 threatens to infect any individual no matter their age. Reingold Decl. ¶ 7.¹¹ Between February 1 and March 16, 2020, 55% of reported cases in the United States occurred in

⁶ See also Elizabeth Cohen, *Experts tell White House coronavirus can spread through talking or even just breathing*, CNN, Apr. 4, 2020, <https://www.cnn.com/2020/04/02/health/aerosol-coronavirus-spread-white-house-letter/index.html>.

⁷ See, e.g., Centers for Disease Control and Prevention, *How COVID-19 Spreads*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Apr. 6, 2020).

⁸ World Health Organization, *Q&A on Coronaviruses (COVID-19)*, “Should I Worry About COVID-19?,” <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last visited Apr. 16, 2020).

⁹ Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, Wall Street Journal, Mar. 10, 2020, <https://www.wsj.com/articles/coronavirus-vs-flu-which-virus-is-deadlier-11583856879>.

¹⁰ See, e.g., Rick Noack et al., *White House Task Force Projects 100,000 to 240,000 Deaths in U.S., Even With Mitigation Efforts*, Washington Post, Apr. 1, 2020, <https://www.washingtonpost.com/world/2020/03/31/coronavirus-latest-news/>.

¹¹ See also CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12 – March 16, 2020*, CDC.gov, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm> (last updated Mar. 26, 2020).

people between the ages of 20-64.¹² As of March 16, 20 percent of those hospitalized due to COVID-19 in the United States were between the ages of 20 and 44.¹³

While people of all ages have contracted and died from COVID-19, it is particularly fatal for older individuals. Reingold Decl. ¶ 7. Preliminary reports based on WHO data show a 3.6% mortality rate for individuals between 60-69 years old, an 8% mortality rate for those 70-79 years old, and a 14.8% mortality rate for those who are 80 years old or older.¹⁴ COVID-19 also poses greater risks for people with preexisting heart and respiratory conditions including asthma, individuals with compromised immune systems, and those with many other conditions. Reingold Decl. ¶ 7.¹⁵

B. Public Health Guidance Regarding COVID-19

Because no vaccine currently exists and will likely not for at least another year, at least for the public at large, Reingold Decl. ¶ 13, public health experts have explained that social distancing measures including maintaining at least six feet of space between people (as well as consistent hygiene practices) are the only known effective measures for protecting against transmission of COVID-19, *id.* ¶ 10.¹⁶ Accordingly, the Virginia Department of Health (“VDH”)

¹² CDC COVID-19 Response Team, *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12 – March 16, 2020*, CDC.gov, <https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm> (last updated Mar. 26, 2020).

¹³ *Id.*

¹⁴ Worldometer, *Age, Sex, Existing Conditions of COVID-19 Cases and Deaths Chart*, <https://www.worldometers.info/coronavirus/coronavirus-age-sex-demographics/> (data analysis based on WHO China Joint Mission Report and Chinese CCDC report published in the Chinese Journal of Epidemiology) (last visited Apr. 16, 2020).

¹⁵ See also Centers for Disease Control and Prevention, *Groups at Higher Risk of Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited Apr. 15, 2020).

¹⁶ See also Johns Hopkins University, *Coronavirus, Social Distancing and Self-Quarantine*, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-social-distancing-and-self-quarantine> (last visited Apr. 15, 2020).

has “urge[d] all Virginians to stay home and practice social distancing” and to “stay at least 6 feet away from others” if going out.¹⁷ VDH’s “Guiding Principles for Community Mitigation Strategies” also require considering “all aspects of a community that might be impacted, including populations most vulnerable to severe illness and those that may be more impacted socially or economically.”¹⁸

The CDC has also issued guidelines concerning voting during the COVID-19 pandemic. Among other things, it recommends that states “[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations” including “mail-in methods of voting if allowed in the jurisdiction.”¹⁹ This is because there is no evidence that SARS-COV-2—the virus that causes COVID-19—is being spread through the mail.²⁰ Medical consequences from substantial in-person voting are beginning to emerge after recent primaries. In Chicago, a March 17 primary worker died from COVID-19, prompting officials to send letters notifying voters, poll workers, field investigators, and cartage companies who were present at the same polling site.²¹ At least one other person in Chicago recently tested positive

¹⁷ *Id.*

¹⁸ Va. Dep’t of Health, *Schools, Workplaces & Community Locations*, <http://www.vdh.virginia.gov/coronavirus/schools-workplaces-community-locations/> (last visited Apr. 15, 2020).

¹⁹ Centers for Disease Control and Prevention, *Recommendations for Election Polling Locations: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last updated Mar. 27, 2020).

²⁰ Press Release, United States Postal Service, *USPS Statement on Coronavirus* (Apr. 2, 2020), <https://about.usps.com/newsroom/statements/usps-statement-on-coronavirus.htm> (citing guidance from World Health Organization, CDC, and Surgeon General).

²¹ Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, NBC Chicago, Apr. 13, 2020, <https://www.nbcchicago.com/news/local/chicago-politics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>.

for COVID-19 after voting in person as well.²² In Florida, two Broward County poll workers tested positive for COVID-19, one of whom was handling driver's licenses as part of the identification verification process.²³ And numerous experts—including Wisconsin's Secretary of Health Services—predicted that the lines at polling places on primary day due to many Wisconsinites being unable to timely vote absentee would increase case total and “would result in more deaths.”²⁴ And as Dr. Reingold testifies, evidence from Milwaukee health authorities that Milwaukee has already identified seven COVID-19 cases linked to people voting in-person April 7 further confirms the personal and public health risks associated with in-person voting. Reingold Decl. ¶ 17.²⁵

C. The Effect and Consequences of COVID-19 in Virginia

In response to the pandemic, Governor Northam declared a State of Emergency for Virginia “to continue to prepare and coordinate our response to the potential spread of COVID-19.”²⁶ On March 13, he closed all Virginia K-12 schools for two weeks, and has now extended

²² NBC Chicago, *Gov. Pritzker Encourages Illinoisans to Vote by Mail After In-Person Voter Tests Positive for Coronavirus*, Apr. 12, 2020, <https://www.nbcchicago.com/news/local/gov-pritzker-encourages-illinoisans-to-vote-by-mail-in-upcoming-general-election/2254687/>.

²³ Anthony Man, *Two Broward poll workers, including one who handled voters' driver licenses, test positive for coronavirus*, South Florida Sun Sentinel, Mar. 26, 2020, <https://www.sun-sentinel.com/coronavirus/fl-ne-broward-elections-poll-workers-coronavirus-20200326-wmgv775dvjc5jis2oagxlpmlule-story.html>.

²⁴ Devi Shastri, *In-person voting was likely a 'disaster' for Wisconsin's efforts to flatten coronavirus curve, national experts say*, Milwaukee Journal Sentinel, Apr. 8, 2020, <https://www.jsonline.com/story/news/politics/elections/2020/04/08/coronavirus-wisconsin-election-likely-hurt-effort-flatten-curve/2961718001/>.

²⁵ See also Alex Seitz-Wald, *7 Wisconsin coronavirus infections linked to election day, health official says*, NBC News, Apr. 21, 2020, <https://www.nbcnews.com/politics/2020-election/7-wisconsin-virus-cases-linked-person-voting-n1188606>.

²⁶ Va. Exec. Order No. 2020-51 (Mar. 12, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-51-Declaration-of-a-State-of-Emergency-Due-to-Novel-Coronavirus-(COVID-19).pdf).

that order for the remainder of the academic year.²⁷ The Governor advised on March 17 that Virginians “with chronic health conditions or aged 65 or older should self-quarantine,” and ordered all DMV offices closed.²⁸ On March 23, Gov. Northam ordered all non-essential businesses closed until at least April 23 and banned public gatherings of more than 10 people.²⁹

On March 30, Gov. Northam issued a statewide “Stay at Home” order to last until June 10, directing all Virginians to stay at home except under extremely limited circumstances. He added: “We are in a public health crisis, and we need everyone to take this seriously and act responsibly. Our message to Virginians is clear: **stay home**. We know this virus spreads primarily through human-to-human contact, and that’s why it’s so important that people follow this order and practice social distancing.”³⁰ Virginia received a Major Disaster Declaration from the federal government on April 2.³¹

²⁷ Press Release, Ralph Northam, Governor of Virginia, Governor Northam Orders All Virginia K-12 Schools Closed for Minimum of Two Weeks (Mar. 13, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854442-en.html>; Press Release, Ralph Northam, Governor of Virginia, Governor Northam Orders Statewide Closure of Certain Non-Essential Businesses, K-12 Schools (Mar. 23, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855292-en.html>.

²⁸ Press Release, Ralph Northam, Governor of Virginia, Governor Northam Announces New Measures to Combat COVID-19 and Support Impacted Virginians (Mar. 17, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-854487-en.html>.

²⁹ Press Release, Ralph Northam, Governor of Virginia, Governor Northam Orders Statewide Closure of Certain Non-Essential Businesses, K-12 Schools (Mar. 23, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855292-en.html>.

³⁰ Va. Exec. Order No. 2020-55 (Mar. 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf); Press Release, Ralph Northam, Governor of Virginia, Governor Northam Issues Statewide Stay at Home Order (Mar. 30, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/march/headline-855702-en.html> (emphasis added).

³¹ Press Release, Ralph Northam, Governor of Virginia, Virginia Receives Major Disaster Declaration from Federal Government for COVID-19 (Apr. 2, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-855921-en.html>.

On March 31, 2020, the Virginia Department of Health (VDH) reported “widespread community transmission across the state.”³² And as of April 21, VDH reported over 9,600 COVID-19 diagnoses in Virginia, resulting in 1,581 hospitalizations and 324 deaths.³³ The evidence suggests that community transmission of COVID-19 in Virginia and elsewhere will persist for at least the next several months as season changes are “unlikely to stop transmission.”³⁴ As Dr. Reingold testifies, “transmission of the virus will continue through the population until the development and widespread use of a vaccine and/or herd immunity.” Reingold Decl. ¶ 12. And because certain other coronaviruses like SARS and MERS-CoV “do not appear to demonstrate seasonality of infection” and because the “current virus has circulated widely in countries currently in their hot seasons,” these points “suggest that transmission of and infection with the virus may not be affected by the weather.” *Id.* In Virginia, researchers from the University of Virginia project mid-August as the most likely peak for COVID-19 in the Commonwealth.³⁵

D. Virginia’s Upcoming Elections

Virginia originally had elections for many local races for scheduled for May 5, and a primary for federal races on June 9, but Governor Northam recently moved the June primary elections to June 23, 2020, and requested that the General Assembly move the May elections to

³² Va. Dep’t of Health, *COVID-19 Cases in Virginia*, <http://www.vdh.virginia.gov/coronavirus/> (last visited Apr. 21, 2020).

³³ *Id.*

³⁴ Marc Lipsitch, DPhil, Professor of Epidemiology and Director, Center for Communicable Disease Dynamics, Harvard T.H. Chan School of Public Health, *Seasonality of SARS-CoV-2: Will COVID-19 go away on its own in warmer weather?*, <https://ccdd.hsph.harvard.edu/will-covid-19-go-away-on-its-own-in-warmer-weather/>.

³⁵ Mel Leonor & Justin Mattingly, *UVA researchers project mid-August peak for new COVID-19 cases in Virginia*, Richmond Times Dispatch, Apr. 13, 2020, https://www.richmond.com/special-report/coronavirus/uvarsearchers-project-mid-august-peak-for-new-covid-19-cases-in-virginia/article_c4e2c008-1617-52d8-ad08-706abfb3d696.html.

November. He took these actions “to further mitigate the spread of COVID-19” and for purposes of “protecting the health and safety of Virginians during this pandemic and ensuring our citizens can make their voices heard in a safe, fair, and uniform manner.”³⁶

Virginia is holding both Democratic and Republican primaries on June 23. For Democrats, there are primary elections for Congress in Virginia’s First, Fourth, Fifth, and Eleventh districts as well as for local offices in Arlington County and Manassas and Manassas Park cities.³⁷ For Republicans, there are primary elections for Congress in Virginia’s Second and Third districts, as well as a statewide primary for U.S. Senate.³⁸ Absentee ballot applications submitted by mail for these races must be received by the appropriate registrar no later than June 16 at 5 PM. Va. Code § 24.2-701(B)(2). Completed absentee ballots must be returned to the registrar by the close of polls on Election Day. Va. Code § 24.2-709.

E. Virginia’s Absentee Ballot Process and the Challenged Witness Requirement

Governor Northam recently signed legislation eliminating the requirement of having an “excuse” in order to vote by mail absentee ballot. Though this no-excuse absentee rule will not take effect until after the June primary, the Department of Elections has stated that Virginia registered voters may apply for and submit an absentee ballot for the June election by choosing reason “2A My disability or illness” due to COVID-19. The Department has “encourage[d] voters to protect their health during COVID-19 outbreak,” and has noted on its website that

³⁶ Press Release, Ralph Northam, Governor of Virginia, Governor Northam Announces Plans to Postpone Upcoming Virginia Elections in Response to COVID-19 (Apr. 8, 2020), <https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-855995-en.html>.

³⁷ Va. Dep’t of Elections, *Certified Candidates in Ballot Order for June 9 Primary Elections*, [https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-\(3\).pdf](https://www.elections.virginia.gov/media/castyourballot/candidatelist/June-2020-Primary-Candidates-List-(3).pdf) (last visited Apr. 19, 2020).

³⁸ *Id.*

absentee voting for the upcoming elections “is strongly encouraged.”³⁹ Although the Commissioner also has “authority to designate alternative methods and procedures to handle [absentee] applications and ballots” in emergency situations, Va. Code § 24.2-713, he has not exercised this power beyond offering the above interpretation of the disability/illness exception.

Individuals may request an absentee ballot online or by sending in a mail request.⁴⁰ They must sign the application “subject to felony penalties for making false statements” that the “facts contained in the application are true and correct” and they “will not vote in the election at any other place in Virginia or in any other state.” Va. Code § 24.2-701(B)(1).⁴¹

When a registrar receives an absentee ballot application and verifies that the individual properly completed the application and is a registered voter in the jurisdiction, the registrar mails to the individual:

- A sealed envelope containing the unmarked ballot;
- An envelope for resealing the marked ballot with a “Statement of Voter,” and spaces for the voter to sign and date and for a witness to sign. The “Statement of Voter” informs voters, among other things, that their signature certifies “subject to felony penalties for making false statements,” their name, legal residence, that they received the ballot after requesting it, that they opened the ballot envelope “in the presence of the witness” but without assistance, that they sealed the ballot in the envelope, and that they “have not voted and will not vote in this election at any other time or place”;
- A pre-addressed envelope to mail the ballot to the general registrar; and
- Instructions for completing the ballot and envelope statement and returning the ballot.

³⁹ Va. Dep’t of Elections, *Absentee Ballots*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (last visited Apr. 15, 2020).

⁴⁰ *Id.*

⁴¹ An exception exists for individuals who cannot sign due to disability, in which case “a person assisting the applicant will note this fact on the applicant signature line and provide his signature, name, and address.” *Id.*

Va. Code § 24.2-706(B). When voters receive their absentee ballots, they “shall, in the presence of a witness, (i) open the sealed envelope marked ‘ballot within’ and (ii) mark and refold the ballot . . . without assistance and without” indicating how they marked the ballot. Va. Code § 24.2-707(A). Once voters mark their ballots, they must seal the ballot in its envelope, “fill in and sign the statement printed on the back of the envelope in the presence of a witness, who shall sign the same envelope,” and enclose the ballot envelope in another envelope and mail or deliver it to the general registrar. *Id.*

When the absentee ballot process counting begins, election officers examine each absentee ballot envelope to determine whether to accept the ballot for counting. Va. Code § 24.2-711 provides that the voter’s failure to provide a middle name, middle initial, or the date shall not be grounds for rejecting the ballot, but is silent as to other requirements including the witness signature. Regulations promulgated by the Board, however, state that the lack of a witness signature on the envelope of the absentee ballot is an omission that is “always material” and such ballots “shall be rendered invalid,” 1 Va. Admin. Code 20-70-20(B). These same regulations also state that the illegibility of the witness signature *shall not* be grounds for rejecting the ballot, even though there is no requirement to identify the witness. *Id.*

Virginia statutes and regulations provide no process by which voters may correct any errors on their absentee ballot envelopes after they are mailed to the general registrar, and in practice all absentee ballots lacking a witness signature are rejected as a matter of course without any effort to verify whether the absentee ballot came from the intended voter. Declaration of Stephanie Iles ¶ 8 (attached as Ex. B). Voters whose ballots are rejected because of a lack of a witness signature do not learn of this until after the election, when the electoral board “sends[s] a written explanation of the reason for rejection of an absentee ballot to the voter whose absentee

ballot is rejected within 90 days of the date on which the ballot is rejected.” Va. Code § 24.2-711.1(B).

F. Virginia’s Laws Supporting Absentee Voting Election Integrity

Virginia has a number of different laws designed to ensure the integrity of absentee balloting procedures, but is only one of eleven states with a witness or notarization requirement.⁴² For one, Virginia registrars maintain a list of voters who applied for and returned absentee ballots, and that list is attested to by the secretary of the electoral board and delivered to the chief officer of election for each precinct. Absentee ballots are only accepted “from voters whose names appear on the attested list.” Va. Code § 24.2-710. And voters themselves must attest under penalty of perjury their identity, residence, and that they did not double vote when they sign their ballot envelope. Va. Code § 24.2-706.

Virginia also has several criminal provisions aimed at discouraging misuse of absentee ballots. A person who “intentionally votes more than once in the same election” commits a Class 6 felony. Va. Code § 24.2-1004(B). Similarly, any “willfully false material statement or entry made by any person” on any ballot constitutes “the crime of election fraud and be punishable as a Class 5 felony.” Va. Code § 24.2-1016. And any person “attempting to vote by fraudulently signing the name of a qualified voter shall be guilty of forgery and shall be guilty of a Class 4 felony.” Va. Code § 24.2-1012.

⁴² See Chart, “Verifying Authenticity of Absentee/Mailed Ballots,” Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options, Nat’l Conf. of State Legislatures (Apr. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>; cf. Ala. Code §§ 17-9-30(b), 17-11-7, 17-11-10; Alaska Stat. § 15.20.030; La. Stat. Ann. § 18:1306(2)(a); Miss. Code Ann. §§ 23-15-627, 23-15-635, 23-15-633; Mo. Rev. Stat. §§ 115.279, 115.283, 115.295; N.C. Gen. Stat. § 163-231; Okla. Stat. tit. 26, § 14-108; 17 R.I. Gen. Laws § 17-20-23; S.C. Code Ann. §§ 7-15-220, 7-15-230; Wis. Stat. § 6.87(4)(b)(1).

G. The Public Health and Disenfranchisement Consequences of Virginia’s Absentee Witness Requirement During Significant COVID-19 Transmission

According to Dr. Reingold, for “individuals without another person able to witness in their household, the requirement that they have someone witness their absentee ballot would place them at increased risk of exposure to and/or transmission of COVID-19.” Reingold Decl. ¶ 17. This is because coming “in close enough proximity to witness their ballot would place them at increased risk of infection,” and “would be particularly risky for those who are at a greater risk of complications and death from COVID-19.” *Id.* And for public health purposes, “to prevent increasing the scope of the outbreak of COVID-19, we must assume that anyone could be infected and infect another person.” *Id.* ¶ 11.

In terms of how many Virginians of voting age live by themselves, as of 2018, Census Bureau figures identify that 25.3% of Virginians 18 and older live alone, while 33% of Virginians 65 and older live alone. Ex. A to Declaration of Davin Rosborough (attached as Ex. C) (data table from 2018 Current Population Survey). For Virginians with a disability who are 18 and older, 37.2% live alone, with 44% of those 65 and older living by themselves. *Id.* And 31% of African-American Virginians 18 and older live alone, much higher than the state average. *Id.* Assuming these numbers apply roughly evenly across Virginia’s 5.73 million registered voters,⁴³ this means that more than 1.4 million Virginia voters likely live alone. In Virginia’s June 2018 primary, more than 541,000 Virginians cast ballots,⁴⁴ meaning that more than 135,000 of these absentee voters likely lived alone.

⁴³ Va. Dep’t of Elections, *Registration Statistics and Polling Places*, <https://www.elections.virginia.gov/resultsreports/registration-statistics/> (last visited Apr. 18, 2020).

⁴⁴ See Exs. B, C to Rosborough Decl. (turnout data from Va. Dep’t of Elections for June 2018 primaries).

Not only do African Americans live alone in larger percentages, but as Governor Northam has acknowledged, racial inequities make African-American Virginians “more likely to have some of the underlying health conditions that put them at greater risk with COVID-19.”⁴⁵ In states where the demographic data is available, African-Americans have made up 42% of people who have died from COVID-19, despite accounting for roughly only 21% of the total population in these areas.⁴⁶ In Virginia, the available data shows that African Americans constitute approximately 20% of Virginia’s population, but make up about 30% of the total number of reported positive cases.⁴⁷

In the City of Norfolk, which is holding municipal elections on May 5 if not rescheduled by the General Assembly, Stephanie Iles, Director of Elections and General Registrar for the City of Norfolk, has already noticed a number of absentee ballots without a witness signature, including one with a handwritten note from the voter saying they were unable to get a witness because they are complying with the Governor’s stay at home and social distancing order. Iles Decl. ¶¶ 6–7. And her office has taken calls from other voters concerned about this issue. *Id.* ¶ 7.

H. Injuries and Irreparable Harm to Plaintiffs

Individual Plaintiffs Erikka Goff and Seijra Toogood are Virginia registered voters who consistently vote in Virginia elections and wish to vote in the upcoming June 23 primary for their respective congressional districts. Declaration of Erikka Goff ¶¶ 3–4 (attached as Ex. D);

⁴⁵ Neal Augenstein, *Virginia governor seeks more data on how COVID-19 affects minorities*, WTOP, Apr. 9, 2020, <https://wtop.com/virginia/2020/04/virginia-governor-seeks-more-data-on-how-covid-19-affects-minorities/>.

⁴⁶ Kat Stafford, et al., *Outcry over racial data grows as virus slams black Americans*, Associated Press, Apr. 8, 2020, https://apnews.com/71d952faad4a2a5d14441534f7230c7c?fbclid=IwAR1plunY_qfeA2KrSUPA1TuJobAwOqH53a_Qlkf5dw0dWjz-iz85GA1FOt4.

⁴⁷ Nana-Séntuo Bonsu, *Disproportionate numbers appearing in African American COVID-19 cases in Virginia; doctor explains*, WKTR, Apr. 10, 2020, <https://www.wtkr.com/news/disproportionate-numbers-appearing-inafrican-african-covid-19-cases-in-virginia-doctor-explains>.

Declaration of Seijra Toogood ¶¶ 1, 3 (attached as Ex. E). Following the recommendations of public health officials and the Virginia Department of Elections, both wish to vote by absentee ballot because of the risk of COVID-19 transmission from voting in person. Goff Decl. ¶ 10; Toogood Decl. ¶ 8. Both live by themselves, however, and will have to violate social distancing guidelines to have their absentee ballots witnessed or counted. Goff Decl. ¶¶ 5, 8; Toogood Decl. ¶¶ 4, 8. Because of the risk of COVID-19 transmission, both Plaintiffs will be disenfranchised in the June primary if the witness requirement remains in place because they will not risk their health to break social distancing guidelines. Goff Decl. ¶ 9; Toogood Decl. ¶ 9. This is particularly true for Plaintiff Toogood, who believes she runs a higher risk for COVID-19 complications due to her asthma and underlying heart condition. Toogood Decl. ¶¶ 5–6.

Plaintiff League of Women Voters of Virginia has a mission of encouraging informed and active participation in government, and influencing public policy through education and advocacy. Declaration of Debora Wake ¶ 2 (attached as Ex. F). The League has nearly 2,000 members across Virginia. *Id.* Some of these members, like Pat McGrady, Anne Claar, and Joan Porte, live alone and like the individual Plaintiffs, they wish to preserve their health by voting in the June primary by absentee ballot but will be unable to do so without violating social distancing guidelines to have their ballot witnessed. *Id.* ¶ 7. This is a particular risk of certain of these League members, who are older than 60 years old and/or have underlying health conditions that put them at greater risk for serious injury or death from COVID-19. *Id.* The League has spoken with Virginia voters who are not League members but find themselves in the same position—they live alone and will be disenfranchised in the June primary if the witness requirement remains in place. *Id.* ¶ 8.

Dealing with the implications of witness requirement has also caused, and will continue to cause, the League to divert resources from other core activities such as voter registration, voter education, and voter mobilization activities to advocating against the witness requirement. *Id.* ¶ 9. It will also have to divert these resources to try to educate voters about the witness requirement should it remain in place, rather than “other critical activities including registering voters without being able to conduct in-person registration drives and educating voters about the many new laws passed by the 2020 General Assembly.” *Id.*

ARGUMENT

A movant merits a preliminary injunction by showing (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)). Here, each factor decisively favors Plaintiffs. In evaluating the burdens on voters, the Court may and should “take judicial notice of official government reports and statistics” including election and voter registration statistics and public health reports from government agencies such as the CDC and VDH. *United States v. Cecil*, 836 F.2d 1431, 1452 (4th Cir. 1988) (internal citations omitted).

I. Plaintiffs are likely to prevail on the merits because the First and Fourteenth Amendments require Virginia to eliminate the absentee witness requirement under the present circumstances.

Plaintiffs “need not establish a ‘certainty of success,’” but they must “make a clear showing” they are likely to succeed. *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). Here, Plaintiffs are highly likely to succeed on their claim because the First and Fourteenth Amendments do not permit a state to deprive tens of thousands of its qualified citizens of the

right to vote or to have their vote counted by maintaining a witness requirement that runs counter to public health guidance and does little, if anything, to promote election integrity.

As the Supreme Court set forth in *Anderson v. Celebrezze* and *Burdick v. Takushi*, any government burden on the right to vote must be balanced against an important government interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Fourth Circuit describes the *Anderson-Burdick* framework as follows:

When facing any constitutional challenge to a state’s election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state’s interests in ensuring that “order, rather than chaos, is to accompany the democratic processes.”

Fusaro v. Cogan, 930 F.3d 241, 257–58 (4th Cir. 2019) (quoting *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995)).

A. The absentee witness requirement merits at least heightened scrutiny because it will disenfranchise thousands of voters during the June primary while worsening a public health crisis.

Under the first step of the *Anderson-Burdick* inquiry, the Court must assess whether, in the midst of the COVID-19 pandemic, requiring that Virginians either: (1) appear in-person at the polls, or (2) find another adult to witness and sign their absentee ballot envelope, severely or at least significantly burdens the right to vote. In considering the burdens imposed, the Court considers both the reach of the burden and the severity of the burden on the individuals it reaches. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198–99 (2008); *see also One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 930 (W.D. Wis. 2016), *order enforced*, 351 F. Supp. 3d 1160 (W.D. Wis. 2019) (“the court must focus on the burdens that the challenged provisions place on eligible voters who cannot comply”) The fact that a majority of voters “are able to comply . . . does not mean that the burdens that these laws impose are

constitutionally insignificant.” *One Wisconsin*, 198 F. Supp. 3d at 930. Because the “right to vote is personal,” an *Anderson-Burdick* claim “is not defeated by the fact that 99% of other people can” easily exercise the franchise despite the challenged provision. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016).

Here, the witness requirement will force, at a minimum, many thousands of voters who live alone to choose between putting themselves and others in serious physical jeopardy and forfeiting their fundamental right to vote in the June 23 primary, making the burden extreme both in its reach and in its depth. The Court should apply at least heightened, if not strict, scrutiny to this requirement because of its devastating effects on the franchise while COVID-19 ravages our communities.

As the state Circuit Court in Richmond recently found in applying strict scrutiny and striking down a candidate signature requirement, while under “normal circumstances” the requirement was a “a light burden,” the “circumstances as they exist in the Commonwealth of Virginia . . . are not normal right now.” *Faulkner v. Va. Dep’t of Elections*, No. CL 20-1546, Slip Op. at 2 (Va. Cir. Ct. Mar. 25, 2020) (attached as Ex. D to Rosborough Decl.); *see also Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 WL 1910154, at *1 (E.D. Mich. Apr. 20, 2020) (noting that “these are not normal times” in halving the number of candidate petition signatures required after Michigan “insist[ed] on enforcing the signature-gathering requirements as if its Stay-at-Home Order responding to the ongoing pandemic had no impact on the rights of candidates and the people who may wish to vote for them”).

1. The absentee witness requirement will severely burden many thousands of Virginia voters in the June primary.

In terms of its breadth, Virginia’s absentee witness requirement has the potential to disenfranchise up to a quarter of the electorate at worst and many thousands of voters at best.

Even in normal, non-pandemic circumstances, Virginia’s witness requirement has caused election officials to reject the ballots of hundreds of voters. According to data from an Election Assistance Commission Survey, in the 2018 general election, at least 583 Virginia voters had their absentee ballots rejected for lack of a witness signature—a number that may still be a significant undercount given the inconsistency of local data collection required for this survey.⁴⁸ See Ex. E to Rosborough Decl. (data from 2018 Election Administration and Voting Survey). But in that election, only 7.1% of voters voted by methods other than in-person on Election Day.⁴⁹ Due to the COVID-19 pandemic, Virginia making absentee voting available to all Virginians for the June primary by use of the illness/disability excuse, and the Department of Elections encouraging vote by mail, absentee voting percentages should skyrocket for the June 23 primary. Even in Wisconsin, whose April 7 primary was beset by confusion and where thousands of individuals who did not receive their absentee ballots on time and were forced to wait in long lines at the polls,⁵⁰ absentee ballot requests were *five times higher* in this year’s primary than in the 2016 primary.⁵¹ Under the present circumstances, the witness requirement will disenfranchise many thousands more voters than in 2018.

⁴⁸ See, e.g., Pew Center on States, *Election Administration by the Numbers An Analysis of Available Datasets and How to Use Them*, Feb. 2012, https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pwelectionsbythenumberspdf.pdf.

⁴⁹ See Jordan Musra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, U.S. Census Bureau (Apr. 23, 2019), <https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html>.

⁵⁰ Parker Schorr, *Wisconsin’s pandemic election: Long waits, face masks as voters go to polls*, The Capital Times, Apr. 8, 2020, https://madison.com/ct/news/local/govt-and-politics/wisconsin-s-pandemic-election-long-waits-facemasks-as-voters-go-to-polls/article_bfd2c391-f390-5364-8c14-a88b548fe017.html; Benjamin Swasey, *Wisconsin Vote Ends As Trump Blames Governor For Long Lines*, NPR, Apr. 7, 2020, <https://www.npr.org/2020/04/07/828835153/long-lines-masks-and-plexiglas-barriers-greet-wisconsin-voters-at-polls>.

⁵¹ Compare Wisc. Election Comm’n, Absentee Ballot Report - April 7, 2020 Spring Election and Presidential Preference Primary, <https://elections.wi.gov/node/6833> (reporting over 1.28 million absentee ballots requested for

The most relevant group of people to consider are Virginia registered voters who live on their own. Because of the ongoing COVID-19 pandemic, many of these Virginians cannot obtain the necessary witness signature for their ballot envelopes without exposing themselves and others to a significant risk of infection for COVID-19. As Dr. Reingold explains, “[r]equiring individuals to have someone they are not otherwise being exposed to come into close enough proximity to witness their ballot would place them at increased risk of infection.” Reingold Decl. ¶ 17. This risk is even greater for those over 65, who “are at the greatest risk of severe cases, long-term impairment, and death.” *Id.* ¶ 17. Similarly, those with “with immunologic conditions” and “other pre-existing conditions” including, like Plaintiff Toogood, certain heart conditions and lung diseases like asthma, “are at high risk of a life-threatening COVID-19 illness.” *Id.* ¶ 17; Toogood Decl. ¶¶ 5–6. And African Americans are also contracting COVID-19 and dying in much higher percentages than the population as a whole, meaning the witness requirement particularly impacts African-American Virginians.

The number of Virginians who will be forced to either brave the polls or break social distancing guidelines to have someone witness and sign their ballot envelope are striking. As of 2018, 25.3% of Virginians 18 and older lived alone. Ex. A to Rosborough Decl. Applying that percentage to Virginia’s 5.73 million registered voters,⁵² one can expect that *well over 1.4 million Virginia voters* live alone. Even focusing on the June primary alone and relying on statistics from Virginia’s June 2018 primary, this data suggests that more than 100,000 Virginia

April 7, 2020 primary) with Riley Vetterkind, *Absentee ballot requests in Wisconsin already exceed number in recent spring elections*, Wisconsin State Journal, Mar. 18, 2020, https://madison.com/wsj/news/local/govt-and-politics/absentee-ballot-requests-in-wisconsin-already-exceed-number-in-recent-spring-elections/article_dfb34fc5-6aa8-5428-90c3-26c3f82a1d70.html (noting that just under 250,000 absentee ballots were requested for the spring 2016 Wisconsin primary).

⁵² Va. Dep’t of Elections, *Registration Statistics and Polling Places*, <https://www.elections.virginia.gov/resultsreports/registration-statistics/> (last visited Apr. 18, 2020).

voters will be severely burdened by the witness requirement in the upcoming primary. In the June 2018 primary—when no-excuse absentee voting was not yet permitted in Virginia—more than 541,000 Virginians cast ballots;⁵³ if we apply the percentage of all Virginia adults who live alone to this figure, it would suggest that more than *135,000 absentee voters in the 2018 primary* lived alone. And that figure likely understates the impact of the witness requirement in this year’s primary, given that any Virginia registered voter may vote an absentee ballot for the June election under the “disability or illness” excuse, and the Department of Elections is “strongly encourag[ing]” Virginians to vote by mail.⁵⁴ Indeed, Wisconsin’s experience in its primary earlier this month—in which five times as many voters requested absentee ballots than had done so in 2016⁵⁵—suggests that Virginia will likewise see an unprecedented surge in absentee ballots. Any reasonable estimate suggests that the witness requirement will force tens of thousands—if not hundreds of thousands—of Virginians to risk their health to vote in the June primary.

To make matters worse, the affected voters will disproportionately be members of populations at heightened risk of severe health complications from COVID-19 exposure. According to data from the U.S. Census Bureau, 25.3% of all Virginians 18 and older live alone. Within that group, however, the percentage of those who live alone rises to 31% among African Americans; 33% among those who are 65 or older; 37.2% of those with a disability; and 44% of those with a disability who are 65 or older. Ex. A to Rosborough Decl.

Evidence from the Plaintiffs and Stephanie Iles, Director of Elections and General Registrar for the City of Norfolk, further shows the broad, disenfranchising sweep of the witness

⁵³ See Exs. B, C to the Rosborough Decl. (turnout data from Va. Dep’t of Elections for June 2018 primaries).

⁵⁴ Va. Dep’t of Elections, *Absentee Ballots*, <https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/> (last visited Apr. 15, 2020).

⁵⁵ See *supra* note 51.

requirement. The individual Plaintiffs live alone, and cannot both follow public health advice and government orders to isolate and socially distance and have their vote by absentee ballot counted. Goff Decl. ¶¶ 5, 8; Toogood Decl. ¶¶ 4, 8. Because of this, they will be disenfranchised in June should the witness requirement stand. Goff Decl. ¶ 9; Toogood Decl. ¶ 9. Similarly, the League has numerous members who live alone and will be in the same predicament. Wake Decl. ¶ 7.

In Norfolk, the largest municipality with a May election (which now may be postponed until November), Director Iles has been seeing steady evidence of this problem as absentee ballots have begun rolling in for the May election. Iles Decl. ¶¶ 6–7, 11. The very first absentee ballot her office received had a missing witness signature and a handwritten note saying the individual was unable to get a witness to sign because they were complying with the Governor’s stay at home and social distancing order. *Id.* ¶ 6. Since then, she has received a number of other absentee ballots without a witness signature with the election still several weeks out. *Id.* ¶ 7. She expects that if the witness requirement stays in place and COVID-19 still is affecting Virginia, the witness requirement “will result in a disproportionate number of absentee ballots being rejected for not meeting the witness signature requirement as compared with past elections.” *Id.* ¶ 11.

The broad sweep of the witness requirement’s burden alone merits heightened, if not strict, scrutiny, and reveals the unconstitutional burden Virginia voters will face if it remains in place.

2. For the thousands of Virginia voters who live alone—especially older individuals, African Americans, and voters with disabilities—the witness requirement means disenfranchisement or jeopardizing one’s health.

Forcing people to face disenfranchisement or put their health on the line in order to cast a valid ballot imposes a severe burden on the right to vote. *See, e.g., Price v. N.Y. State Bd. of*

Elections, 540 F.3d 101, 107 n.8 (2d Cir. 2008) (noting that for “voters who are . . . housebound” the burden of a lack of absentee voting opportunity “could be quite significant”); *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (holding that Florida’s voter registration deadline unconstitutionally burdened the right to vote in light of Hurricane Matthew where the disaster “foreclosed the only methods of registering to vote” during the final week of Florida’s voter registration window). That is precisely why the witness requirement not only casts a wide burden, but a deep one as well. And the way the requirement is carried out in Virginia ensures disenfranchisement for those who do not follow it. Once a ballot is received without a witness signature, it is not counted and no opportunity to cure is given. Iles Decl. ¶ 8. The voter only learns of their disenfranchisement when it is too late. So not only will the witness requirement burden thousands of Virginians for the June primary, but it will result in full disenfranchisement for those it burdens and who cannot risk their health.

Many thousands of Virginia voters live by themselves and will be unable to vote without undertaking serious risks to their health and, collectively, to public health. At a time when the Governor has ordered the closure of all schools and non-essential businesses, and issued a statewide “Stay at Home” order directing Virginians to minimize “human-to-human contact” and to “practice social distancing,” the witness requirement will force tens or even hundreds of thousands of Virginians to venture from their homes to meet with another adult to witness and sign their absentee ballots. This is precisely the opposite of what the Commonwealth has demanded that people do to protect their health and safety.

Having someone come “in close enough proximity to witness [an individual’s] ballot would place them at increased risk of infection,” Reingold Decl. ¶ 17. Public health experts instruct that individuals should “assume that anyone could be infected and infect another

person.” *Id.* ¶ 11. For these quarter of Virginians that live alone—which include disproportionately higher percentages of groups at higher risk for serious COVID-19 cases and death including senior citizens and African Americans⁵⁶—the many individuals like Plaintiffs and some League members who cannot or will not risk their health to vote in person or find a witness will not have their vote counted in the June primary. The consequences are particularly high and will result in greater rates of disenfranchisement for older and African-American Virginians, as having their absentee ballot witnessed and signed “would be particularly risky for those who are at a greater risk of complications and death from COVID-19.” Reingold Decl. ¶ 17.

Further, for those individuals who decide to submit their absentee ballot in spite of not having a witness, there is no discretion left to local officials about whether to accept the ballot. *See* 1 Va. Admin. Code 20-70-20(B); Iles Decl. ¶ 8. Nor is there any opportunity to cure the issue once the ballot is mailed or submitted as voters are not informed that their ballot is rejected until after the election when the electoral board “sends[s] a written explanation of the reason for rejection of an absentee ballot to the voter whose absentee ballot is rejected within 90 days of the date on which the ballot is rejected.” Va. Code § 24.2-711.1(B). This matches the experience of Norfolk Director of Elections Iles, who explains that once a ballot comes into her office, it is considered cast, so if it is missing something material like a witness signature, it is rejected without a chance to cure. Iles Decl. ¶ 8.

Therefore, the witness requirement’s burden for the June primary in light of continued COVID-19 transmission will not only be widespread, but also severe for the voters affected.

⁵⁶ See *supra* Factual Background § G.

B. The absentee witness requirement’s burden on voters far outweighs its minimal-to-nonexistent promotion of election integrity.

Even “[s]light” burdens on the fundamental right to vote must still “be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). As such, even in situations of minimal burdens, a court must still “actually weigh the burdens imposed on the plaintiff against the *precise* interests put forward by the State,” and take into account “the extent to which those interests make it necessary to burden the plaintiff’s rights,” unlike traditional rational basis review. *Price*, 540 F.3d at 108–09 (internal citations and quotation marks omitted). As explained above, the witness requirement imposes a severe burden on voters who are living alone and are social distancing during the COVID-19 pandemic, such that at least heightened, if not strict, scrutiny should apply. But even if the Court were to find that the witness requirement places a lesser burden on Virginia voters, that burden would still outweigh any benefits of the witness requirement. Two recent cases are instructive.

In *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016), the Sixth Circuit affirmed the district court’s decision to strike down Ohio’s law rejecting absentee ballot envelopes that had technical errors in the birthdate or address field. It explained that although “the burden is small for most voters, . . . none of the precise interests put forward by Ohio,” including a generalized interest in “[c]ombating voter fraud perpetrated by mail,” was sufficient to overcome that burden. *Id.* Because Ohio’s interest was justified by only “the ‘rare’ instances where a fraudster manages to swipe the ballot of a registered absentee voter, forge the signature, and return the ballot” with the individual’s identifying information, a burden on even a small number of voters was enough to render the law unconstitutional. *Id.*

Similarly, in *One Wisconsin*, a district court held that the elimination of a portion of Wisconsin's early voting period was only a moderate burden because those voters still had other opportunities to early vote and "can vote using mail-in absentee voting or vote on election day." 198 F. Supp. 3d at 933. Despite this, the Court held that the rollback violated the fundamental right to vote because the state's asserted interests "do not justify the moderate burdens that the challenged provisions impose." *Id.* at 934.

Here, as discussed above, the burdens are far greater than either *One Wisconsin* or *Northeast Ohio Coalition* and require at least heightened scrutiny. Like the Virginia Circuit Court in Richmond recently found in granting a preliminary injunction against a candidate signature requirement, the law "is not narrowly tailored to advance" government interests because "it does not provide for emergency circumstances, like those that currently exist." *Faulkner*, No. CL 20-1546, Slip Op. at 3. But like *One Wisconsin* or *Northeast Ohio Coalition*, the witness requirement cannot survive even under a less stringent standard of review because it does not actually serve the important government interest of election integrity, and that interest is sufficiently protected by other laws. In fact, the witness requirement is likely the least effective one of several laws designed to promote election integrity in the absentee process.

For one, a witness signature adds very little to nothing to other election integrity procedures for absentee ballots. While the presence of the witness signature is mandatory and the lack of one causes the ballot's rejection, the illegibility of the witness signature does not result in ballot rejection. *See* 1 Va. Admin. Code 20-70-20(B). Therefore, while election officials check for the presence of a signature on the witness line, it offers nothing to those officials' verification or authentication procedures. *See* Iles Decl. ¶ 9. Indeed, the South Carolina Election Commission recently declared that the state's similar witness requirement offers "*no benefit*" to election

officials, because officials “have no ability to verify the witness’s signature.”⁵⁷ This is likely why 39 states and the District of Columbia have rejected witness requirements, except for the narrow category of voters who require assistance filling out their ballots.⁵⁸

More importantly, Virginia has other ways to ensure the integrity of the absentee voting process. Absentee ballot envelopes must contain several other pieces of identifying information about the voters themselves—such as their first and last name, house number, street name or rural route address, city, and zip code—the omission of any of which results in their vote being rejected. 1 Va. Admin. Code 20-70-20(B)(2)-(5). Voters must also attest under penalty of perjury that they are who they say they are, they live where they say they live, and that they did not double vote when they sign their ballot envelope. *See* Va. Code § 24.2-706; 1 Va. Admin. Code 20-70-20(B)(6). Virginia registrars also maintain a list of voters who applied for and returned absentee ballots, and absentee ballots are only accepted from voters whose names appear on that list. Va. Code § 24.2-710. Further, Virginia laws make it a felony to intentionally double vote, Va. Code § 24.2-1004(B), make a “willfully false material statement” on a ballot, Va. Code § 24.2-1016, or forge another person’s name, Va. Code § 24.2-1012.

The witness requirement provides no additional benefit to election integrity beyond these significant protections. Manipulating the absentee voting process already requires being able to provide all the identifying information needed for a ballot application and then ballot, and the willingness to fraudulently sign under penalty of perjury that someone else’s ballot is their own.

⁵⁷ Ltr. to Gov. Henry McMaster at 3, South Carolina Election Commission (March 30, 2020) (attached as Ex. F to the Rosborough Decl.).

⁵⁸ *Cf.* Ala. Code §§ 17-9-30(b), 17-11-7, 17-11-10; Alaska Stat. § 15.20.030; La. Stat. Ann. § 18:1306(2)(a); Miss. Code Ann. §§ 23-15-627, 23-15-635, 23-15-633; Mo. Rev. Stat. §§ 115.279, 115.283, 115.295; N.C. Gen. Stat. § 163-231; Okla. Stat. tit. 26, § 14-108; 17 R.I. Gen. Laws § 17-20-23; S.C. Code Ann. §§ 7-15-220, 7-15-230; Va. Code §§ 24.2-706, 707; Wis. Stat. § 6.87(4)(b)1.

For the rare individual willing and able to do so, the witness requirement is unlikely to serve as an additional deterrent or check.

And what little evidence exists of attempts to manipulate the absentee process in Virginia suggests that such occurrences are exceedingly rare. Even a database from the Heritage Foundation—which nonpartisan, independent researchers have called “grossly exaggerated and devoid of context”⁵⁹—has identified only two cases of election fraud in Virginia concerning absentee voting in the past 13 years.⁶⁰ During the same time period, almost 33 million voters cast their ballots in Virginia elections.⁶¹ Thus, these statistics would lead to a total voting fraud incidence related to absentee balloting of approximately .00000006 percent over votes cast in Virginia over the past thirteen years.

Far from serving an important government interest, the witness requirement in fact undermines the government’s compelling interest in protecting public health during the COVID-19 pandemic. *See, e.g., Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995) (upholding law because it serves the “sufficiently compelling governmental interest[]” of “protect[ing] public health”); *Forest Hills Early Learning Ctr., Inc. v. Lukhard*, 728 F.2d 230, 241 (4th Cir. 1984) (recognizing the government’s “compelling state interest arising from [a] substantial threat to public health . . .”). In order to slow the spread of COVID-19 and protect public health, Governor Northam ordered people to stay in their homes unless absolutely

⁵⁹ Rudy Mehrbani, *Heritage Fraud Database: An Assessment*, The Brennan Center, Sept. 8, 2017, <https://www.brennancenter.org/our-work/research-reports/heritage-fraud-database-assessment>.

⁶⁰ The Heritage Foundation, Election Fraud Cases, <https://www.heritage.org/voterfraud/search?state=VA> (last visited Apr. 21, 2020).

⁶¹ *See* Va. Dep’t of Elections, *November General Elections: 1976 – Present*, <https://www.elections.virginia.gov/resultsreports/registrationturnout-statistics/> (last visited Apr. 21, 2020).

necessary.⁶² The Governor’s order is consistent with guidance from both the CDC and the Virginia Department of Health—entities whose views on such matters are entitled to some degree of deference. *See, e.g., Tolman v. Doe*, 988 F. Supp. 582, 586 (E.D. Va. 1997) (explaining that the CDC’s “views are relied upon by the medical profession as authoritative” and that “the CDC is the type of public medical health officials to which courts should defer”); *Smith v. Potter*, 187 F. Supp. 2d 93, 97 (S.D.N.Y. 2001) (same).

The witness requirement requires people who live by themselves to leave their homes or invite people into them in order to cast a valid ballot, at significant risk not only to their own health and that of their witnesses, but to public health. Because the witness requirement offers little if any benefit to election integrity, even were the burden of the requirement not so massive, those burdens would still outweigh any governmental benefit and make the provision unconstitutional during community transmission of COVID-19.

II. A preliminary injunction is necessary to prevent irreparable harm to Plaintiffs’ constitutional rights.

Irreparable harm requires a movant to “make a clear showing that it will suffer harm that is neither remote nor speculative, but actual and imminent. Additionally, the harm must be irreparable, meaning that it cannot be fully rectified by the final judgment after trial.” *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 (4th Cir. 2019) (citations and internal quotation marks omitted), *cert. denied sub nom. Givens v. Mountain Valley Pipeline, LLC*, 140 S. Ct. 300 (2019).

⁶² Va. Exec. Order No. 2020-55 (Mar. 30, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

“Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C. v. North Carolina* (“LWVNC”), 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases). This is partly because “the right of suffrage is a fundamental matter in a free and democratic society.” *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964); accord *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”). And it is partly also because “once the election occurs, there can be no do-over and no redress,” so the injury to “voters is real and completely irreparable if nothing is done to enjoin [the challenged] law.” *LWVNC*, 769 F.3d at 247; see also *Fla. Democratic Party*, 215 F. Supp. 3d at 1258 (voting rights cases are not situations “where failing to grant the requested relief would be a mere inconvenience to Plaintiff and its members”—an election “isn’t golf: there are no mulligans.”).

Here, both individual Plaintiffs and League members wish to vote by absentee ballot to protect their health. On the one hand, these individuals face disenfranchisement if they cast an absentee mail ballot without a witness signature. On the other, they face an unconscionable risk to their health if they are compelled to either satisfy the witness requirements for absentee voting or vote in person at the polls. As noted above, disenfranchisement certainly causes irreparable harm, and of course there “can be no injury more irreparable” than “serious, lasting illness or death.” *Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020); see also *id.* at *7 (noting that “courts have even specifically held that COVID-19 constitutes an irreparable harm that supports the grant of a TRO” and citing cases). A preliminary injunction provides the only effective means for protecting Plaintiffs’ and many other Virginians’ constitutional rights to vote in the June primary without asking them to seriously risk their

health. For Plaintiffs Goff and Toogood, as with as multiple League members, they will be disenfranchised in the June primary without a preliminary injunction. Goff Decl. ¶ 9; Toogood Decl. ¶ 9.

The League also faces irreparable harm as an organization in several respects. For one, a voting rights organization is “irreparably harmed when the right to vote is wrongfully denied or abridged—whether belonging to its membership or the electorate at large.” *N.C. State Conf. of NAACP v. Cooper*, No. 1:18CV1034, 2019 WL 7372980, at *24 (M.D.N.C. Dec. 31, 2019); *see also Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1295 (N.D. Ga. 2018) (finding plaintiff organization’s harm “to its organizational interests is coterminous with the harms suffered by its citizen members”); *Common Cause Indiana v. Lawson*, 327 F. Supp. 3d 1139, 1154 (S.D. Ind. 2018), *aff’d*, 937 F.3d 944 (7th Cir. 2019) (accepting that organization faced irreparable harm based on such harm to its members and the state electorate at large).

Additionally, the witness requirement harms the League’s mission of ensuring that all qualified Virginians are registered to vote and participate in the democratic process, because it “impairs the organization’s programs, making it more difficult to carry out its mission.” *Action NC v. Stranch*, 216 F. Supp. 3d 597, 642 (M.D.N.C. 2016); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (noting irreparable harm based on legal barriers that “ma[de] it more difficult for [the organization] to accomplish their primary mission of registering voters”). Further, the League has begun and will need to continue diverting its limited resources from other efforts including registering voters and educating them about changes to Virginia’s elections law by its need to focus on lobbying the Commonwealth to fix the witness requirement and attempting to educate Virginians about the witness requirement. Wake Decl. ¶ 9. These lost opportunities are irreparable harm, because “when a plaintiff loses an opportunity

to register a voter, the opportunity is gone forever.” *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012); *see also LWVNC*, 769 F.3d at 247; *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018); *Ind. State Conf. of the NAACP v. Lawson*, 326 F. Supp. 3d 646, 662–63 (S.D. Ind. 2018); *Action NC*, 216 F. Supp. 3d at 642–43.

Finally, the harm to Plaintiffs is not only irreparable, but imminent. With the primary approaching on June 23, all of the evidence points toward continuing community transmission through that period. As Dr. Reingold testified, it is unlikely that herd immunity will develop this year and without it, “we can expect that COVID-19 will continue to transmit widely” and the evidence from transmission in hot countries and other similar viruses “suggest that transmission of and infection with the virus may not be affected by the weather.” Reingold Decl. ¶¶ 14, 16; *see also Tex. Democratic Party v. DeBeauvoir*, No. D1-GN-001610 (Travis Cty. Dist. Ct. Apr. 17, 2020) (finding irreparable harm if all Texas voters cannot vote by mail and noting a high “risk of transmission of COVID-19” for Texas’s “July 14, 2020 Run-Off election and all subsequent elections for this year”) (Ex. G to Rosborough Decl.). And researchers from the University of Virginia just issued projections pointing to mid-August as the most likely peak for COVID-19 cases in Virginia, well past the primary.⁶³

Because the evidence points to continuing and perhaps increasing transmission in Virginia well into June and beyond, the irreparable injuries faced by Plaintiffs are imminent and merit immediate relief.

⁶³ Mel Leonor & Justin Mattingly, *UVA researchers project mid-August peak for new COVID-19 cases in Virginia*, Richmond Times Dispatch, Apr. 13, 2020, https://www.richmond.com/special-report/coronavirus/uvarsearchers-project-mid-august-peak-for-new-covid-19-cases-in-virginia/article_c4e2c008-1617-52d8-ad08-706abfb3d696.html.

III. The balance of equities and the public interest support injunctive relief.

The “public interest . . . favors permitting as many qualified voters to vote as possible.” *LWVNC*, 769 F.3d at 247–48 (citations and internal quotation marks omitted). A “state is in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.” *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (citation and internal quotation marks omitted). After all, “upholding constitutional rights surely serves the public interest,” of which the State is the custodian. *Id.*

Additionally, enjoining the witness rule promotes “the public interest in . . . safeguarding public health.” *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013) (holding that “the public interest in this case lies with safeguarding public health”); *Diretto v. Country Inn & Suites by Carlson*, No. 1:16CV1037 (JCC/IDD), 2016 WL 4400498, at *4 (E.D. Va. Aug. 18, 2016) (“The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease.”). The Commonwealth recognizes this, with VDH urging “all Virginians to stay home and practice social distancing” and to “stay at least 6 feet away from others” if going out,⁶⁴ and noting that “all aspects of a community that might be impacted, including populations most vulnerable to severe illness and those that may be more impacted socially or economically,” must be considered in adapting to COVID-19.⁶⁵ Enjoining the witness rule will allow Virginians to continue to observe VDH guidelines to protect public health as well

⁶⁴ *Id.*

⁶⁵ Va. Dep’t of Health, *Schools, Workplaces & Community Locations*, <http://www.vdh.virginia.gov/coronavirus/schools-workplaces-community-locations/> (last visited Apr. 15, 2020).

as avoid a situation where those “most vulnerable to severe illness” bear the burdens of disenfranchisement or risk public health and their own.

Conversely, no important State interest will be compromised by a preliminary injunction authorizing all Virginia registered voters to cast absentee ballots without having to satisfy ineffectual witness requirements in the middle of a pandemic. As already discussed, Virginia already has a raft of other electoral integrity provisions to protect absentee voting, and the witness requirement provides an ineffectual method of doing so in any event. Rather, such an order would vindicate the public interests of promoting both public health and access to the franchise.

CONCLUSION

For the foregoing reasons, Plaintiffs seek a preliminary injunction: (1) prohibiting Defendants from enforcing the witness requirement (as stated in Va. Code § 24.2-706 and § 24.2-707 and as interpreted by 1 Va. Admin. Code 20-70-20(B)) for all Virginia voters for the June 23 primaries and for any and all subsequent elections in Virginia until such time as in-person interactions required by compliance with the witness requirement no longer pose a risk to public health and personal safety; (2) ordering Defendants to issue guidance instructing city and county election officials to count otherwise validly cast absentee ballots that are missing a witness signature for Virginia’s June 23 primary elections; and (3) ordering Defendants to conduct a public information campaign informing Virginia voters about the elimination of this requirement, in coordination with city and county election officials.

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Davin M. Rosborough (VSB # 85935)*
Dale E. Ho**
Sophia Lin Lakin**
Theresa J. Lee**
Adriel I. Cepeda-Derieux**
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
drosborough@aclu.org
dho@aclu.org
slakin@aclu.org
tlee@aclu.org
acepedaderieux@aclu.org

Respectfully submitted,

/s/ Vishal Agraharkar
Vishal Agraharkar (VSB #93265)
Eden Heilman (VSB #93554)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF AMERICA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
vagraharkar@acluva.org
eheilman@acluva.org

Attorneys for Plaintiffs

* Currently Associate Status with Virginia Bar; Application for reinstatement to active status pending

**Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I certify that on April 21, 2020, I served a copy of the foregoing Brief in Support of Plaintiffs' Motion for a Preliminary Injunction and attached exhibits on Counsel for Defendants via e-mail, as agreed to by Defendants' Counsel in writing per Federal Rule of Civil Procedure 5(b)(2)(E).

/s/ Vishal Agraharkar
Vishal Agraharkar (VSB #93265)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF AMERICA, INC.
701 E. Franklin Street, Suite 1412
Richmond, Virginia 23219
Phone: (804) 644-8080
Fax: (804) 649-2733
vagraharkar@acluva.org

Counsel for Plaintiffs