NO. _____

In the

Supreme Court of the United States

PATSY J. WISE; REGIS CLIFFORD; SAMUEL GRAYSON BAUM; DONALD J. TRUMP FOR PRESIDENT, INC.; GREGORY J. MURPHY, U.S. Congressman; DANIEL BISHOP, U.S. Congressman; REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; NORTH CAROLINA REPUBLICAN PARTY; C MILLE ANNETTE BAMBINI; GREGORY F. MURPHY, U.S. Congressman,

APPLICANTS,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the State Board of Elections; JEFF CARMON, in his official capacity as Member of the NC State Board of Elections; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; NORTH CAROLINA STATE BOARD OF ELECTIONS,

RESPONDENTS.

APPENDIX TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2104

PATSY J. WISE; REGIS CLIFFORD; SAMUEL GRAYSON BAUM; DONALD J. TRUMP FOR PRESIDENT, INC.; GREGORY F. MURPHY, U.S. Congressman; DANIEL BISHOP, U.S. Congressman; REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; NORTH CAROLINA REPUBLICAN PARTY; CAMILLE ANNETTE BAMBINI,

Plaintiffs – Appellants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the State Board of Elections; JEFF CARMON, in his official capacity as Member of the NC State Board of Elections; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants – Appellees,

and

BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; CAREN RABINOWITZ,

Intervenors/Defendants – Appellees.

No. 20-2107

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; BOBBY HEATH; MAXINE WHITLEY; ALAN SWAIN,

Plaintiffs – Appellants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board Elections; JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections; KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants – Appellees,

and

BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; CAREN RABINOWITZ

Intervenors/Defendants – Appellees.

O R D E R

Upon consideration of submissions relative to the emergency motions for injunction pending appeal, the court denies injunctive relief pending appeal.

Chief Judge Gregory, Judge Motz, Judge King, Judge Keenan, Judge Wynn, Judge Diaz, Judge Floyd, Judge Thacker, Judge Harris, Judge Richardson, Judge Quattlebaum, and Judge Rushing voted to deny the motions for injunction. Judge Wilkinson, Judge Niemeyer, and Judge Agee voted to grant the motions for injunction.

Judge Wynn wrote an opinion on the denial of emergency injunctive relief. Judge Motz wrote a concurring opinion. Judge Wilkinson and Judge Agee wrote a dissenting opinion in which Judge Niemeyer joined. Judge Niemeyer wrote a separate dissenting opinion.

For the Court

/s/ Patricia S. Connor, Clerk

WYNN, Circuit Judge, denying emergency injunctive relief:

The judges of the Fourth Circuit and our fellow judges on North Carolina's state and federal courts have done an admirable job analyzing these weighty issues under substantial time constraints. Our prudent decision today declines to enjoin the North Carolina State Board of Elections's extension of its deadline for the receipt of absentee ballots for the ongoing general election.

Reading the dissenting opinion of our colleagues Judge Wilkinson and Judge Agee, one might think the sky is falling. Missing from their lengthy opinion is a recognition of the narrowness of the issue before us. Importantly, the *only* issue we must now decide is Plaintiffs' request for an emergency injunction pending appeal regarding a single aspect of the procedures that the district court below refused to enjoin: an extension of the deadline for the receipt of mail-in ballots. *All ballots must still be mailed on or before Election Day*. The change is simply an extension from three to nine days after Election Day for a timely ballot to be received and counted. That is all.

Implementation of that simple, commonsense change was delayed by judicial intervention. To be sure, some of that intervention was by the state courts: although a state trial court approved of the ballot-receipt extension, a state appellate court stayed it pending appeal, a stay that was lifted late yesterday afternoon. *See* Defendants' Supp. Letter (Oct. 19, 2020). That stay was, of course, the state court's prerogative. But prior to the state appellate court's intervention, it was solely *federal court* intervention that kept this change from being implemented. Our dissenting colleagues would perpetuate that intervention now, despite the Supreme Court's admonitions against taking such action.

Yet North Carolina voters deserve clarity on whether they must rely on an overburdened Post Office to deliver their ballots within three days after Election Day. The need for clarity has become even more urgent in the last week, as in-person early voting started in North Carolina on October 15 and will end on October 31. As our dissenting colleagues so recently reminded us, a federal court injunction would "represent[] a stark interference with [North] Carolina's electoral process right in the middle of the election season," which is inappropriate because "the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections," especially when the "law is commonplace and eminently sensible." *Middleton v. Andino*, No. 20-2022, 2020 WL 5752607, at *1 (4th Cir. Sept. 25, 2020) (Wilkinson and Agee, JJ., dissenting) (internal quotation marks omitted).

This fast-moving case is proceeding in state court and involves an ongoing election—two sound reasons for us to stay our hand. Because Plaintiffs have not established a likelihood of success on the merits—and because, in any event, *Purcell* and *Andino* require that we not intervene at this late stage—we rightly decline to enter an injunction pending appeal.

I.

The North Carolina Alliance for Retired Americans and several individual voters filed suit against the State Board of Elections ("Board") in Wake County Superior Court on August 10, 2020, challenging, among other provisions, the state's requirement that mail-in ballots be received within three days of Election Day. Speaker Tim Moore and Senate

President Pro Tempore Phil Berger—two of the plaintiffs here—intervened as defendants alongside the Board on August 12.[1]

On September 15, the State Board voted unanimously—and in bipartisan fashion!—to extend the receipt deadline for this election until nine days after Election Day (November 12, 2020).[2] The *NC Alliance* plaintiffs agreed to a settlement based, in part, on this change. On September 22, they joined the Board in asking the state court to approve a Consent Judgment formalizing the new receipt deadline. The state court issued an order approving the Consent Judgment on October 2.[3] This October 2 order established the relevant status quo for *Purcell* purposes. Under this status quo, all absentee votes cast by Election Day and received by November 12 would be counted.

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[1] The political-committee Plaintiffs in the *Wise* case before us also successfully intervened in the *NC Alliance* litigation on September 24, 2020, where they claimed to represent the interest of "Republican voters throughout the state." *Moore v. Circosta*, No. 20-2062, Defendants-Appellants' App'x at 286.

[2] This was far from a radical move. The Board regularly extends its absentee ballot receipt deadlines in response to the hurricanes that befall us in the autumn. *See* Emergency Order—Updated 11/5/1018, N.C. State Bd. of Elections (Nov. 5, 2018), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Order_2018-10-19.pdf (extending deadline to nine days after Election Day in response to Hurricane Florence); Second Emergency Executive Order, N.C. State Bd. of Elections (Sept. 6, 2019), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Order2_2019-09-06.pdf (extending deadline to eight days after Election Day in response to Hurricane Dorian).

[3] The state court explicitly found that the Consent Judgment was the product of arms-length negotiations between the parties. *See Wise* Intervenor-Appellees' App'x at 37. Efforts to characterize this good-faith agreement as a collusive backroom deal bulldoze through that plainly supportable conclusion.

However, on September 26, Speaker Moore, Leader Berger, and others initiated two federal lawsuits in the Eastern District of North Carolina. On October 3—the day *after* the state court issued final judgment—Judge Dever granted those parties' request for a Temporary Restraining Order, preventing the Consent Judgment from going into effect.[4] Judge Dever's order thus suspended the status quo already created by the state court order.

On October 5, the Board filed emergency motions for administrative and temporary stays of the TRO—which it properly understood to be a preliminary injunction, in effect if not in name—pending appeal in this Court. While those motions were pending, on October 6, Plaintiffs filed a motion in the district court to formally convert the TRO into a preliminary injunction. On the same day, Plaintiffs sought a writ of supersedeas as well as a temporary stay and expedited review of the *NC Alliance* judgment from the North Carolina Court of Appeals.

A week went by. The Fourth Circuit panel assigned to hear the Board's motions to stay Judge Dever's TRO did not take any action. The district court finally ruled on the motions for preliminary injunctions on October 14. And on October 15, the state appellate court granted a temporary stay—a stay that it dissolved yesterday when it denied the petitions for writs of supersedeas. Accordingly, the ballot receipt extension has gone into effect. *See* Defendants' Supp. Letter (Oct. 19, 2020).

Again, before us now is only the issue of whether to grant an injunction—which a district court has already denied—of the ballot-receipt extension. Our dissenting colleagues

[4] By that order, Judge Dever also transferred the case to Judge Osteen in the Middle District of North Carolina.

apparently believe the witness-requirement issue is also before us, as their opinion is peppered with references to it, and even proposes to order injunctive relief on that point. *See* Wilkinson and Agee Dissenting Op. at 46. Yet, as Plaintiffs themselves vigorously assert, "the *only* aspect of the revised Numbered Memo 2020-19 that Appellants are seeking to enjoin is the extension of the receipt deadline." *Moore* Reply Br. at 1; *see also Wise* Reply Br. at 3 (noting that the most recent version of the memo issued by the Board "honor[s] the Witness Requirement"). And indeed, as the district court noted, the one-witness requirement remains in place under the district court's August 4, 2020 injunction. *Moore v. Circosta*, No. 1:20CV911, 2020 WL 6063332, at *2 (M.D.N.C. Oct. 14, 2020). The injunction our colleagues propose to issue on the witness requirement is therefore inappropriate, and their references throughout their opinion to that aspect of the parties' dispute are inapposite.

II.

From the outset, *Purcell* strongly counsels *against* issuing an injunction here.

The status quo is plainly that the ballot-receipt extension is in place. The extension took effect after the district court's TRO expired (October 16) and the state appellate court dissolved its temporary administrative stay (October 19). But even before those injunctions lifted, the ballot-receipt extension has been the status quo ever since the trial court approved the settlement (October 2).

The Supreme Court's recent decision in *Andino* instructs that it is not federal court decisions, but state decisions, that establish the status quo. In *Andino*, there was a state law in place that was modified by a federal court injunction for the primaries; the state law

continued to be in place for the November election; and the district court again enjoined it. My view was that the injunction at the time of the primaries—establishing the rules when voters most recently voted—was the status quo. *Middleton v. Andino*, No. 20-2022, 2020 U.S. App. LEXIS 31093, at *10 (4th Cir. Sep. 30, 2020) (Wynn, J., concurring). But our dissenting colleagues disagreed, viewing the state law as the status quo and federal court intervention as inappropriate under *Purcell*. *See Middleton*, 2020 WL 5752607, at *1 (Wilkinson and Agee, JJ., dissenting). The Supreme Court agreed with our colleagues. *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). Apparently, then, it is the state's action—not any intervening federal court decision—that establishes the status quo.

Here, the state's action was to implement the challenged modifications.[5] The status quo was therefore established on October 2, when the state court approved the Consent Judgment in *NC Alliance*. The district court below agreed. *See Moore*, 2020 WL 6063332, at *23 (refusing to enjoin the absentee ballot receipt deadline extension as it would be inappropriate to cause confusion by "changing [the] election rules" the state established on October 2). *Purcell* and *Andino* therefore require that we refuse to enter an injunction here.

Further, contrary to our dissenting colleagues' assertion, Wilkinson and Agee Dissenting Op. at 44–45, *Purcell* is about *federal court* intervention. *See, e.g.*, *Andino*,

[5] Our dissenting colleagues believe that we must defer to the General Assembly over the Board. Wilkinson and Agee Dissenting Op. at 22. But whether the Board may properly act as an agent of the state legislature is a complicated question of state law that is, at this moment, being litigated in state court. As discussed below, *Pullman* abstention requires that we refrain from injecting ourselves into the middle of this dispute.

2020 WL 5887393, at *1 (Kavanaugh, J., concurring) ("[F]or many years, this Court has repeatedly emphasized that *federal courts* ordinarily should not alter state election rules in the period close to an election." (emphasis added)); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("This Court has repeatedly emphasized that *lower federal courts* should ordinarily not alter the election rules on the eve of an election." (emphasis added)); *Andino*, 2020 WL 5752607, at *1 (Wilkinson and Agee, JJ., dissenting) ("[T]he federal Constitution provides *States—not federal judges*—the ability to choose among many permissible options when designing elections. The [contested injunction] upends this whole structure and turns its back upon our federalist system." (internal quotation marks and citation omitted) (emphasis added)); *cf. Scarnati v. Boockvar*, No. 20A53, 2020 U.S. LEXIS 5182, at *1 (Oct. 19, 2020) (denying by divided vote an application for stay of decision by Pennsylvania Supreme Court extending deadline for receipt of absentee ballots); *Republican Party of Pa. v. Boockvar*, No. 20A54, 2020 U.S. LEXIS 5181, at *1 (Oct. 19, 2020) (same).

Our dissenting colleagues' attempt to stretch *Purcell* beyond its clear limits to cover not just federal court action, but also action by state courts *and* state executive agencies acting pursuant to a legislative delegation of authority, proves too much. They cite no authority for this expansion, and there is none.

Indeed, our dissenting colleagues' assertion that "there is no principled reason why this rule should not apply against interferences by state courts and agencies," Wilkinson and Agee Dissenting Op. at 44, flips *Purcell* on its head: our colleagues *justify* federal court intervention—the one thing *Purcell clearly* counsels against—based on their own notions

of what the Supreme Court *should have* said in *Purcell*. We cannot agree with such an expansion of federal court power at the expense of states' rights to regulate their own elections.[6] To do so would amount to inappropriate judicial activism.

III.

Turning to whether Plaintiffs are likely to succeed on the merits, the district court concluded that the Board likely violated the Equal Protection Clause when it extended the deadline for receipt of civilian absentee ballots postmarked by Election Day from three days after Election Day to nine days after Election Day. The court relied heavily on *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). *See Moore*, 2020 WL 6063332, at *17, 19. *Bush* prohibits arbitrary and disparate treatment in the valuation of one person's vote in relation to another's.[7]

[6] Additionally, the primary justification behind the *Purcell* principle—as our dissenting colleagues correctly state—is to avoid "chaos." *See* Wilkinson and Agee Dissenting Op. at 23, 34, 46; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (noting that "[c]ourt orders affecting elections" can create "voter confusion"). It is difficult to conceive what chaos our colleagues can possibly be envisioning here. *Voter behavior cannot be impacted by our decision one way or another.* Voters *must* postmark their mail-in ballots on or before Election Day. Thus, the deadline extension only changes two things: more votes cast by mail will be counted rather than discarded because of mail delays, and fewer voters will have to risk contracting the novel coronavirus by voting in person. Only a grotesquely swollen version of *Purcell* would consider this "voter confusion," or in any way harmful.

[7] Of course, *Bush* is of limited precedential value. *See Bush*, 531 U.S. at 109 ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."). This analysis treats it as binding for present purposes.

This case totally lacks the concern with arbitrary or disparate standards that motivated *Bush*. The standard could not be clearer or more uniform: *everyone* must cast their ballot on or before Election Day, and the ballot will be counted for *everyone* as long as it is received within nine days after Election Day. Nor will the ballot receipt extension lead to the "unequal evaluation of ballots," another worry in *Bush*. 531 U.S. at 106. Everyone's ballot is worth the same under the extension.

Looking beyond *Bush*, there appears to be no support for the district court's equal protection conclusion anywhere in our jurisprudence. Here, no voter will be treated differently than any other voter as everyone will be able to have their absentee ballots counted if mailed in on time and received on time. Moreover, in a sharp departure from the ordinary voting-rights lawsuit, *no one was hurt by this deadline extension*. The extension does not in any way infringe upon a single person's right to vote: all eligible voters who wish to vote may do so on or before Election Day.

Indeed, several of the plaintiffs have already voted. *See Moore*, 2020 WL 6063332, at *1–2. The extension simply makes it easier for more people to vote absentee in the middle of a global pandemic that has killed over 200,000 Americans. How this implicates the Equal Protection Clause—a key provision of the Reconstruction Amendments that protects individuals' right to *equal protection* under the law[8]—is beyond our understanding.

[8] *Cf. Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020), *as amended* (July 27, 2020) (Niemeyer, J.) ("Despite the plaintiffs' argument to the contrary, no vote . . . is diluted. Every qualified person gets one vote and each vote is counted equally in determining the final tally.").

But there is more. Plaintiffs' equal protection argument is plainly in conflict with the Supreme Court's recent action in *Andino*, where the Court permitted votes that lacked a witness signature to be counted so long as they were cast before the Supreme Court's stay issued and were received within two days of the order. *Andino*, 2020 WL 5887393, at *1. If the Board's absentee ballot receipt deadline violates the Equal Protection Clause by changing rules mid-election, so did the Supreme Court's order in *Andino*.

Nor is the perfunctory analysis of our dissenting colleagues on this point persuasive: they merely reference state officials applying "different rules to different voters in the same election" and concerns about "the diluting effect of illegal ballots." Wilkinson and Agee Dissenting Op. at 42–43. Whether ballots are *illegally* counted if they are received more than three days after Election Day depends on an issue of state law from which we must abstain.

As for applying different rules to different voters, again, the Board's change does no such thing. All voters must abide by the exact same restriction: they must cast their ballots on or before Election Day. The change impacts only an element outside the voters' control: how quickly their ballots must be received to be counted. This change, of course, may have its own important consequences for the health of our citizenry—in terms of unnecessary infections avoided—and our democracy—in terms of lawful ballots cast and counted.

IV.

Plaintiffs also believe that the Board violated the Elections Clause when they extended the absentee ballot receipt deadline. But as the district court properly concluded,

Plaintiffs lack standing to bring their Elections Clause claim. *Moore*, 2020 WL 6063332, at *23–25. Two of the plaintiffs in *Moore* are leaders of their respective chambers in the North Carolina General Assembly: the Speaker of the House (Moore) and the President Pro Tempore of the Senate (Berger).

In their current request for an injunction, they argue that they have standing to bring an Elections Clause claim on behalf of the North Carolina General Assembly pursuant to N.C. Gen. Stat. § 120-32.6(b), which provides in relevant part that "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties." This provision does nothing to confer standing on Plaintiffs Moore and Berger because the subject of this action is a change by the Board, not the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution.

V.

Furthermore, even if Plaintiffs had standing to pursue the Elections Clause issue, the *Pullman* abstention doctrine strongly counsels us, as a federal court, against exercising jurisdiction over that claim. *Pullman* abstention applies where "there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983) (internal quotation marks omitted).

Here, Plaintiffs are asking federal courts to determine whether the Board acted within the scope of its authority delegated by the Legislature. This is a close issue of *state* law involving competing interpretations of North Carolina's statutes governing election procedures and implicating complex questions concerning the separation of powers in the state. None of the parties have suggested or argued that state courts have already settled this issue conclusively. Indeed, the state court that approved the Consent Judgment considered and rejected Plaintiffs' argument as to this issue, while the district court reached the opposite conclusion. *See Wise* Intervenor-Appellees' App'x at 454–56; *Moore*, 2020 WL 6063332, at *26–30. This very conflict suggests that the issue is far from settled.[9]

Nor is there any question that the resolution of this state law question is "potentially dispositive." *Educ. Servs.*, 710 F.2d at 174. If a reviewing state court decides that the Board acted within its authority, then there is plainly no Elections Clause problem. Conversely, if the state court concludes that the Board lacked authority and declares the Consent Judgment invalid, we will no longer have a case since that would moot all of the federal constitutional claims.

Indeed, we have previously deemed *Pullman* abstention appropriate where the resolution of an issue concerning state delegation of authority would moot the constitutional questions presented. *See K Hope, Inc. v. Onslow Cnty.*, 107 F.3d 866 (4th

[9] That being said, a state trial court approved of the ballot-receipt extension, and a state appellate court declined to enjoin it. Accordingly, all evidence suggests that the state courts do not believe the Board acted beyond its authority in ordering the extension.

Cir. 1997) (unpublished table disposition). And contrary to the district court's misstatement, *Moore*, 2020 WL 6063332, at *11, the state-law question concerning the scope of the Board's authority remains squarely before the state courts.[10] *See Wise* Intervenor-Appellees' App'x at 686–92. "Where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim," the Supreme Court has "regularly ordered abstention." *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975).

Few cases implicate the "dual aims" of the *Pullman* abstention doctrine—"avoiding advisory constitutional decisionmaking" and "promoting the principles of comity and federalism"—more strongly than this one. *Pustell v. Lynn Pub. Schs.*, 18 F.3d 50, 53 (1st Cir. 1994). Thus, we should abstain from "needless federal intervention into local affairs." *Id.*

Plaintiffs do not have standing to pursue their Elections Clause claim anyway. But nonetheless, this issue may have implications for their Equal Protection claim as well.

In assessing Plaintiffs' likelihood of success on the merits regarding their Equal Protection challenge to the receipt deadline extension, the district court rested its analysis in part on the fact that the "change contravenes the express deadline established by the General Assembly," which is three days after Election Day. *Moore*, 2020 WL 6063332, at *19; *see also* Wilkinson and Agee Dissenting Op. at 43 (appearing to agree with the district

[10] Accordingly, although the district court is of course correct that we generally "must predict how [a state's] highest court would rule" when it has not yet done so, here, we need not guess: we may simply allow this lawsuit to proceed, as it is presently doing, in the state courts. *Moore*, 2020 WL 6063332, at *30.

court's analysis on this point by referring to "the diluting effect of illegal ballots"). Of course, if the Board is the agent of the Legislature for purposes of the Elections Clause—the very state-law issue from which we must abstain deciding—there is no contravention and there are no illegal ballots.

VI.

In sum, Plaintiffs are not likely to succeed on the merits with their novel Equal Protection theory. They lack standing to raise their Elections Clause challenge; even if they did not, we ought to exercise *Pullman* abstention. Furthermore, all suggestions from the state courts point to the conclusion that the Board properly exercised its legislative delegation of authority. There is no irreparable harm from a ballot extension: again, *everyone must submit their ballot by the same date*. The extension merely allows more lawfully cast ballots to be counted, in the event there are any delays precipitated by an avalanche of mail-in ballots.

And the balance of equities is influenced heavily by *Purcell* and tilts against federal court intervention at this late stage. *Andino* establishes that the appropriate status-quo framework is the status quo created by the state's actions, not by later federal court interventions. We ought not to perpetuate any further this inappropriate intervention by granting the "extraordinary and drastic remedy" of a preliminary injunction. *CASA de Md., Inc. v. Trump*, 971 F.3d 220, 241 (4th Cir. 2020) (Wilkinson, J.) (quoting *Munaf v. Geren*, 553 U.S. 674, 690–91 (2008)). Such a remedy would be particularly extraordinary here, where the injunction would be granted by a federal appellate court in the first instance—after a federal trial court, state trial court, *and* state appellate court all declined to do so.

And even if reasonable minds can disagree on the merits, an injunction is still inappropriate here. The district court believed that Plaintiffs were *likely to succeed* on their equal protection claims. But, pursuant to *Purcell*, the court concluded that injunctive relief was inappropriate at this late date. *Moore*, 2020 WL 6063332, at *1. We rightfully do not disturb that sound judgment from a judge who has been thoughtfully considering these matters for months. Nor need we: the state appellate court has itself exercised control over this matter and the Supreme Court of North Carolina stands ready to act thereafter. As the district court wisely recognized, there is no need, in the middle of an ongoing election, for the federal courts to intervene into the voting affairs of North Carolina.

Accordingly, this Court must deny the requested injunction. To do otherwise would risk endangering a great many of our doctrines, to say nothing of the health of the voters of North Carolina as they attempt to safely exercise their right to vote.

DIANA GRIBBON MOTZ, Circuit Judge, concurring in the denial of emergency injunctive relief:

I concur in full with Judge Wynn's excellent opinion for the court. I write separately to reiterate just two points.

First, recent actions of the Supreme Court make clear that it is up to a state to decide what election procedures are in effect on Election Day, and not federal courts. *See, e.g.*, *Republican Party of Pa. v. Boockvar, Sec. of Pa.*, No. 20A54, 592 U.S. --- (Oct. 19, 2020); *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). Indeed, in a case strikingly similar to this one, the Supreme Court recently declined to grant a stay where "the state election officials support the challenged decree." *Republican Nat'l Comm. v. Common Cause Rhode Island*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020). So too here. The North Carolina legislature by statute conferred authority on the Board of Elections to "exercise emergency powers to conduct an election in a district where the normal schedule is disrupted by" a "natural disaster." N.C. Gen. Stat. § 163-27.1. That two individual legislators disagree with this delegation of power by the legislature is of no moment: "individual members [of a state legislature] lack standing to assert the institutional interests of a legislature" absent clear authorization. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).

Second, the plaintiffs' equal protection argument is deeply troubling. Quite unlike the ordinary challenge to state election procedures, plaintiffs here have not asserted *any* injury to their fundamental right to vote. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Rather, they challenge measures that remove burdens on other citizens exercising

their right to vote. The dissent seeks to recast these measures, aimed at maximizing citizens' ability to have "a voice in the election," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), as ones with nefarious "diluting effect[s]," Dissenting Op. at 43 (quoting *Gray v. Sanders*, 372 U.S. 368, 380 (1963)). Not so. To be sure, a state "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 105 (2000). But if the extension went into effect, plaintiffs' votes would not count for less *relative to other North Carolina voters.* This is the core of an Equal Protection Clause challenge. *See Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("Simply stated, an individual's right to vote . . . is unconstitutionally impaired when its weight is in a substantial fashion diluted *when compared with* votes of citizens living on other parts of the State.") (emphasis added). The extension does not dilute some votes relative to others — rather, it has the same effect on all North Carolina voters.

WILKINSON and AGEE, Circuit Judges, with whom NIEMEYER, Circuit Judge, joins, dissenting:

We dissent from the court's grant of a hearing *en banc* in this case and the failure of the court to grant appellants' motions for injunctions against the North Carolina State Board of Elections pending appeal. Because of this case's importance, we judge it is necessary to lay out our reasoning with clarity. This course is necessary in order to draw attention to the accelerating pace of pre-election litigation in this country and all the damaging consequences ensuing therefrom.[1]

Here, as in *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020), we are faced with nonrepresentative entities changing election law immediately preceding or during a federal election. In making those changes, they have undone the work of the elected state legislatures, to which the Constitution clearly and explicitly delegates the power to "prescribe[]" "[t]he Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. The Constitution does not assign these powers holistically to the state governments but rather pinpoints a particular branch of state government—"the Legislatures thereof." *Id.* Whether it is a federal court—as it was in *Andino*—or a state election board—as it is here—does not matter; both are unaccountable entities stripping

[1] Two cases are consolidated before us: *Moore v. Circosta*, No. 20-2107, and *Wise v. Circosta*, No. 20-2104. For the sake of concision, we refer to Timothy Moore, Speaker of the North Carolina House of Representatives, and Philip Berger, President Pro Tempore of the North Carolina Senate, as the "legislative leader plaintiffs" and all the individual voter plaintiffs in both cases as the "voter plaintiffs." The defendants in both cases are the North Carolina State Board of Elections and its officers, members, and Chair, whom we refer to collectively as "the Board."

power from the legislatures. They are changing the rules of the game in the middle of an election—exactly what *Purcell v. Gonzalez*, 549 U.S. 1 (2006), counsels against. By the time the Board changed the rules, voters had cast over 150,000 ballots in North Carolina.

Let's understand the strategy that is being deployed here. The status quo is the election law enacted by the North Carolina General Assembly. The Constitution grants state legislatures that power. Principles of democratic accountability reinforce it. The fair notice to all voters of election ground rules well in advance of Election Day commend it.

Then along come the disruptive efforts of federal courts or, in this case, a state election board to upend the set rules right in the middle of an election. The disruptors then hail their action as the new status quo, which is (the irony of this is rich) claimed to be beyond any power of disturbance.

It takes no special genius to know what this insidious formula is producing. Our country is now plagued by a proliferation of pre-election litigation that creates confusion and turmoil and that threatens to undermine public confidence in the federal courts, state agencies, and the elections themselves.

Only by repairing to state legislative intent can we extricate ourselves from this debilitating condition. The statutes of state legislatures are our sole North Star. When, as here, the plain wording of those enactments is transgressed, the entire body politic pays a grievous price. In the service of policy objectives, the majority is stripping state legislatures of the responsibility our founding charter has assigned them. And in so doing, it has encouraged others to regard state statutes as little more than advisory and for pre-election litigants fair game.

Sometimes the state legislature will be in the hands of one party. Sometimes it will be in the hands of the other. Sometimes control may be divided. It matters not. These laws are what we as a nation have to live by, and to witness our democratic dissolution in this manner is heart-rending for the many good Americans of all persuasions who still view partisan advantage as subordinate to their country's lasting welfare.

As for *Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194 (U.S. Oct. 20, 2020), where a stay was denied by the Supreme Court on a 4-4 vote: the circumstances here are materially different. For one thing, the petition in *Boockvar* was brought to the court by representatives of a single house of the Pennsylvania legislature, whereas here representatives of both houses are united in their petition before the courts. In addition, the questionable circumstances that plainly indicated a state agency's subversion of the state legislature's intent were not present in the Pennsylvania case. The agency's extension of the statutory receipt deadline for mailed absentee ballots was twice as long as in the Pennsylvania suit. Nor did the Pennsylvania action involve the elimination by an agency of a statutory witness signature requirement. In short, this case presents a clean opportunity for the Supreme Court to right the abrogation of a clear constitutional mandate and to impart to the federal elections process a strong commitment to the rule of law.

Allowing the Board's changes to go into effect now, two weeks before the election and after half a million people have voted in North Carolina, would cause yet further intolerable chaos. Thus for the reasons that follow, we dissent and would grant the request for an injunction pending appeal. We urge plaintiffs to take this case up to the Supreme Court immediately. Not tomorrow. Not the next day. Now.

I.

A.

On June 12, 2020, Governor Roy Cooper signed into law the Bipartisan Elections Act of 2020 (Bipartisan Elections Act), in which an overwhelming bipartisan majority of the General Assembly amended North Carolina's election procedures. *See* 2020 N.C. Sess. Laws § 2020-17. Responding to the COVID-19 pandemic, the bill altered the state's election law to facilitate safe voting, while maintaining the integrity of the state's elections. In one key part, the law reduced the witness requirement for absentee ballots from two witnesses to one witness on the condition that the witness include his or her name and address with their signature. *See id.* § 1.(a). The General Assembly also left in place the deadline for receipt of absentee ballots postmarked on or before Election Day; that deadline continued to be "three days after the election by 5:00 p.m." N.C. Gen. Stat. § 163-231(b)(2)b.

A series of state and federal lawsuits followed the passage of this law, challenging its contents as well as unchanged provisions of North Carolina's election code.

In the first federal case, Democracy North Carolina and several North Carolinian voters sued the Board in the Middle District of North Carolina. The court allowed the Speaker of the North Carolina House of Representatives (Speaker) and the President Pro Tempore of the North Carolina Senate (President Pro Tempore) to intervene in the case. On August 4, Judge Osteen issued an order granting in part and denying in part the preliminary injunction requested by the plaintiffs. *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-CV-457, 2020 WL 4484063, at *64 (M.D.N.C. Aug. 4, 2020). He

upheld the one-witness requirement as constitutional and declined to supplant the legislature by ordering the establishment of contactless drop boxes. *Id.* at *36, *45.

B.

Not even a week after Judge Osteen issued his opinion and order, the North Carolina Alliance for Retired Americans and a different set of individual voters filed suit against the State Board of Elections in the North Carolina Superior Court for the County of Wake. On August 12, the Speaker and the President Pro Tempore filed a notice of intervention as of right. On August 18, the plaintiffs requested a preliminary injunction and filed briefing and evidence in support on September 4. On September 22, the plaintiffs and the Board defendants jointly moved for entry of a consent decree. The legislative defendant-intervenors opposed entry of the decree.

The consent decree ordered three changes to North Carolina's election procedures.[2] First, the decree extended the statutory receipt deadline for mailed absentee ballots postmarked on or before Election Day by six days. *Moore* Appellant App. at 35. That change trebled the legislature's receipt deadline from three days to nine. Second, the decree effectively eliminated the witness requirement for absentee ballots by creating a cure process through which voters could—without a witness—self-certify their ballots. *See id.* at 36. Third, the decree required the establishment of "a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices." *Id.*

[2] These changes were outlined in three Board memoranda: the September 2020-19 memo, the Numbered Memo 2020-22, and the Numbered Memo 2020-23.

On September 26, the Speaker and the President Pro Tempore along with three individual voters sought a TRO and preliminary injunction in the Eastern District of North Carolina to prohibit the implementation of these changes.

On October 2, the state court entered the consent judgment, which it explained in an October 5 opinion. The North Carolina Court of Appeals issued an administrative stay against the consent decree on October 16, 2020, and lifted it without opinion on October 19, 2020.

On October 3, Judge Dever, the federal judge in the Eastern District of North Carolina, granted the requested TRO enjoining the implementation of the State Board's three memoranda until October 16, 2020, and transferred the case to Judge Osteen to hold preliminary injunction hearings in conjunction with *Democracy N.C. Moore v. Circosta*, No. 5:20-CV-507-D, 2020 WL 5880129, at *9 (E.D.N.C. Oct. 3, 2020). Without considering plaintiffs' Elections Clause claim, Judge Dever found their Equal Protection Clause arguments "persuasive." *Id.* at *5. He found that, by changing election rules after the North Carolina election had begun, the Board "ignored the statutory scheme and arbitrarily created multiple, disparate regimes under which North Carolina voters cast absentee ballots." *Id.* at *7. These actions led to a high likelihood of "a debasement or dilution of the weight of a citizen's vote," *id.* at *6 (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)), and an "arbitrary or disparate treatment of members of [the state's] electorate," *id.* (quoting *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam)) (alteration in original). The court issued the TRO as necessary "to maintain the status quo." *Id.* at *7 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam)).

C.

After hearings, Judge Osteen denied the preliminary injunction. He rejected the defendant Board's arguments that (1) the court lacked jurisdiction, (2) abstention was appropriate, and (3) collateral estoppel barred the plaintiffs' claims. *Moore* Appellant App. at 93–101. In *Democracy North Carolina*, Judge Osteen issued an All Writs Act injunction that prohibited the Board from instituting the witness requirement cure procedure, and that injunction is not before this court on appeal. We note, however, that Judge Osteen found that the Board (1) "mischaracterize[ed]" his August 4 "injunction in order to obtain contradictory relief in another court," *Wise* Appellant App. at 386, and (2) misrepresented to him the arguments that it made to the state court, *see id.* at 388–89.

Considering the voter plaintiffs' Equal Protection Clause claims first, Judge Osteen found that none had standing on their vote dilution theory, but that they did have standing on their arbitrary and disparate treatment theory. *Id.* at 107–08. The voter plaintiffs articulated a cognizable injury for that theory because they had already cast their absentee ballots and thus had to meet a different standard for voting than the absentee voters who had not yet voted when the Board issued its changes in September. *Id.* at 111–14. On the Elections Clause claim, the court held that the legislative leaders lacked standing because "[t]he General Assembly ha[d] not directly authorized Plaintiffs to represent its interests in this specific case," but rather its statutory authorization covered only intervening as defendants when the constitutionality of a North Carolina statute was challenged. *Id.* at 140–43.

Judge Osteen found that the voter plaintiffs had established a likelihood of success on the merits. *Id.* at 121. The Board's actions were arbitrary because its witness cure process contravened the duly enacted laws of the state legislature. *See id.* at 122–23. The Board's procedure allowed votes for which there was no witness at any point in the process, and this created a preferred class of voters. *Id.* at 124. Judge Osteen noted that his August 4 injunction did not require the Board to do this, so it could not be the basis of settling the state court lawsuit through the consent decree, which he characterized as "secretly-negotiated." *Id.* at 83, 124. The extension of the ballot deadline was also arbitrary because the change "contravene[d] the express deadline established by the General Assembly." *Id.* at 126. Since these constitutional violations could not be remedied after the election, he found that the voters would suffer irreparable harm. *Id.* at 134. However, he found that the balance of the equities weighed against relief because he believed the *Purcell* principle, which bars courts from changing election rules shortly before federal elections, applied to prohibit him from entering an injunction so close to an election. *Id.* at 135–37.

Despite not finding standing for the legislative plaintiffs, Judge Osteen nevertheless addressed the merits of the Elections Clause claim and found that the Board had exceeded its authority under North Carolina law because its rules had created "an unnecessary conflict with the legislature's choice" when it was under a statutory mandate to minimize conflict with the state's election law. *Id.* at 154.

On October 15, the legislative leaders and the voter plaintiffs filed a notice of appeal and requested an injunction pending resolution of their appeal to preserve the status quo.

We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) to review the denial of a preliminary injunction.

II.

As a preliminary matter, the Board defendants present two reasons why the district court could not hear plaintiffs' claims. First, they argue that plaintiffs are collaterally estopped from making their Equal Protection Clause argument in light of the North Carolina state court decision. Second, they argue that the voter plaintiffs do not have standing to seek relief. For the reasons discussed herein, they are mistaken.

A.

Collateral estoppel does not bar plaintiffs from raising their Equal Protection Clause claim in federal court. We look to the preclusion law of North Carolina to make this determination because "the Full Faith and Credit Act requires that federal courts give the state-court judgment . . . the same preclusive effect it would have had in another court of the same State." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986). In North Carolina, under the doctrine of collateral estoppel, "the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Whitacre P'ship v. Biosignia, Inc.*, 591 S.E.2d 870, 880 (N.C. 2004). Defendants must establish that all requirements are satisfied. *Thomas M. McInnis & Assocs. v. Hall*, 349 S.E.2d 552, 557 (N.C. 1986).

In the instant case, the Board is attempting to collaterally estop the voter plaintiffs from arguing that its rule changes and the state court consent decree violate their rights to

vote under the Equal Protection Clause. Those voters were not party to the state court litigation, so the Board must show that the voter plaintiffs in the instant case "[a]re in privity with parties" to the state court case—that is, the legislative leaders. *Id.*

In its broad contours, "'privity' for purposes of . . . collateral estoppel 'denotes a mutual or successive relationship to the same rights of property.'" *Hales v. N.C. Ins. Guar. Ass'n*, 445 S.E.2d 590, 594 (N.C. 1994) (quoting *Settle ex rel. Sullivan v. Beasley*, 308 S.E.2d 288, 290 (N.C. 1983)). The North Carolina Supreme Court has said that "interest[] in the same question" is not sufficient to establish privity. *State ex rel. Tucker v. Frinzi*, 474 S.E.2d 127, 130 (N.C. 1996) (quoting 47 Am. Jur. 2d *Judgments* § 663 (1995)). The defendants point to no shared property rights between the legislative leaders and the voter plaintiffs and offer only out-of-state precedent for the proposition that these parties' relationship is one that can give rise to privity. Since the general rule in American law is one of nonparty preclusion in only "limited circumstances," *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008), we decline to so extend North Carolina privity law and find that the voter plaintiffs are not collaterally estopped from bringing their Equal Protection Clause claim.

We also agree with Judge Osteen's conclusion that the legislative plaintiffs are not collaterally estopped from bringing their Elections Clause claim, and we reject defendants' arguments to the contrary. As the Supreme Court explained in *Arizona v. California*, 530 U.S. 392, 414 (2000), the general American rule is that "consent judgments ordinarily support claim preclusion but not issue preclusion." *Id.* (quoting 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4443, pp. 384-85 (1981)). Although the consent decree discusses the release of claims *against* the Board,

it evinces no intent to preclude the legislative leaders from litigating their Election Clause claim in subsequent litigation. And the legislative leaders never consented to or signed the consent decree. *See Nash Cty. Bd. of Editors v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981) (under North Carolina law a "lack of actual consent" negates preclusion). And even if the consent decree *could* have preclusive effect, our review of the record suggests that the legislative plaintiffs did not have "a full and fair opportunity to litigate that issue in the earlier proceeding," *Whitacre P'ship*, 591 S.E.2d at 880. The state court addressed the legislative leaders' Election Clause argument in a single conclusory sentence without any analysis. Under North Carolina preclusion law, plaintiffs are not barred from relitigating the important Elections Clause issues they raise in this case.

B.

Article III of the U.S. Constitution limits federal courts to resolving "cases and controversies," of which "[t]he doctrine of standing is an integral component." *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). As the parties invoking federal jurisdiction, plaintiffs "bear[] the burden of establishing standing." *Id.* To do so, they must show that their injury is (1) "actual[,] . . . not conjectural or hypothetical, (2) . . . traceable to the challenged conduct[,] and (3)" redressable by a favorable court order. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). We first address the legislative leaders' standing to bring the Elections Clause claim and then turn to the voters' standing to bring the Equal Protection Clause claim.

The Speaker and the President Pro Tempore have standing to bring a challenge under the Elections Clause. Under North Carolina law, the Speaker and the President Pro

Tempore jointly represent the interests of the General Assembly of North Carolina and can pursue those interests in court. *See* N.C. Gen. Stat. § 1-72.2. Although the General Assembly did not authorize this particular suit, that is just one possible indicium of institutional injury, not a requirement. It is sufficient that the General Assembly authorized them to represent their interests in court. And, unlike *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), in which a closely-divided Court did not find standing, the legislative leaders in this case represent both houses and are asserting an interest of the legislature *qua* legislature, not one of the state. Thus, this case is more analogous to *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), in which the Court did finding legislative standing.

In analyzing legislative standing, the Supreme Court has applied the same framework from *Lujan* that governs general standing analysis. *See Ariz. State Legislature*, 576 U.S. at 799–800. The legislative leaders maintain that the General Assembly has been injured by the Board usurping their authority under the Elections Clause to set "[t]he Times, Places and Manner of holding Elections" because the Board's rule changes contravene the recently enacted election statute. Like the Arizona Legislature with its redistricting plan, the North Carolina General Assembly claims its election timeline and witness requirement have been "completely nullified" by impermissible executive action. *Id.* at 803 (quoting *Raines v. Byrd*, 521 U.S. 811, 823 (1997)). This is a sufficiently concrete infringement on the General Assembly's constitutional prerogatives to proceed to the merits. And the traceability and redressability prongs are also met because an injunction against the implementation of the Numbered Memoranda would return the electoral procedures to the

status quo, which the legislative leaders believe is consistent with the statute they enacted and thus redresses their Elections Clause grievance.

The voters have standing to bring an Equal Protection Clause claim. They argue that the Board's allowance of ballots without a witness and ballots received after the statutory deadline arbitrarily and disparately treats them differently from other voters in violation of the Equal Protection Clause. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000). Since the Board's procedural changes directly caused this alleged harm and an injunction would return the electoral procedures to the status quo, the traceability and redressability prongs of standing have been satisfied. For much the same reasons as the district court, we find that the plaintiffs have demonstrated an actual injury they will suffer if they are correct on the merits. Since some voter plaintiffs have already cast their absentee ballots, the effective elimination of the witness requirement and the extension of the ballot receipt deadline would create requirements for later voters that differed from those to which the plaintiffs were subject. [3]

Therefore, we find that the voter plaintiffs have adequately pleaded facts to support their standing to bring this case.

III.

To merit an injunction pending appeal, plaintiffs must show they are likely to succeed on the merits of their appeal, that they will be irreparably injured absent an injunction, that the equitable balance favors an injunction, and that an injunction benefits

[3] The voter plaintiffs also allege a harm stemming from vote dilution. Because a single basis is sufficient to establish standing, we do not assess this argument.

the public. *See John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016). We conclude that all four factors favor plaintiffs, and we therefore would issue the injunction pending appeal.

Ordinarily, we would hesitate to issue an injunction pending appeal. But two special factors are present in this case. First, our disagreement with the district court is very narrow. We agree with the district court's conclusion that plaintiffs are likely to succeed on the merits of their claims and that they will be irreparably injured absent a preliminary injunction. However, the district court reasoned that the *Purcell* principle, which bars courts from changing balloting rules shortly before federal elections, required denying a preliminary injunction "even in the face of what appear to be clear violations." *Moore* Appellant App. at 158. We believe that *Purcell* requires the opposite result, and that it operates to bar the Board from changing the rules at the last minute through a state-court consent decree.

Second, an injunction pending appeal is necessary to preserve the status quo, properly understood. Exercising its constitutional power under the Elections Clause of the U.S. Constitution, the General Assembly set rules for the upcoming election in response to the COVID-19 pandemic. By changing those rules during an ongoing election, the Board changed the status quo. Only an injunction pending appeal can "alleviate that ongoing harm." *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting). Allowing the Board's changes to go into effect now, only two weeks before the election and after half a million North Carolinians have voted, will cause chaos that equity cannot tolerate.

A.

First, we agree with the district court that plaintiffs are likely to succeed on the merits of their appeal. The Board has commandeered the North Carolina General Assembly's constitutional prerogative to set the rules for the upcoming federal elections within the state. The Constitution explicitly grants the power to set the rules for federal elections to the General Assembly. The Elections Clause states that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed *in each State by the Legislature thereof*; but Congress may at any time by Law make or alter such Regulations." U.S. Const. art. 1, § 4, cl. 1 (emphasis added). The Electors Clause states that "[e]ach State shall appoint, in such Manner *as the Legislature thereof may direct*," electors for President and Vice President. U.S. Const. art. II, § 1, cl. 2 (emphasis added); *see also McPherson v. Blacker*, 146 U.S. 1, 27 (1892) (explaining that this clause "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointing presidential electors).

Unlike many parts of the Constitution, these clauses speak in clear, direct language. The power to regulate the rules of federal elections is given to a specific entity within each State: the "Legislature thereof." The word "legislature" was "not of uncertain meaning when incorporated into the Constitution." *Smiley v. Holm*, 285 U.S. 355, 365 (1932); *Hawke v. Smith*, 253 U.S. 221, 227 (1920). In North Carolina, the legislative power is given solely to the General Assembly. N.C. Const. art. II, § 1 ("The legislative power of the States shall be vested in the General Assembly . . . .").

But these clauses also embody the brilliance of other constitutional provisions: they establish a check on the power of the state legislature. That power is given to one institution: the United States Congress. This power is not given to the state courts, and it is not given to the states' executive branches. *See, e.g.*, The Federalist No. 59 (Alexander Hamilton) (discussing division of power between the state legislatures and Congress to make federal election rules but mentioning no other branches of government). The Founders knew how to distinguish between state legislatures and the State governments as a whole. They did so repeatedly throughout the Constitution. *See, e.g.*, U.S. Const. art. 1, § 2 (distinguishing between "State" and "State Legislature"). Therefore, the only plausible inference from the constitutional text is that the term "legislature" unambiguously excludes the power to regulate federal elections from state courts and executive-branch officials.[4]

Defendants argue that this is just a state-law case, and that the federal courts have no business acting upon it. We agree with defendants that federalism and a robust respect for the substantial authority of the state courts are essential to our constitutional order.

[4] In *Arizona State Legislature*, the Court found that the legislative power of a State to draw congressional district lines could be shared with other branches of state government. 576 U.S. at 808–09 ("[O]ur precedent teaches us that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto."). That case does not control this one because the Arizona Constitution changed the state's "lawmaking process" to empower an entity in addition to the state legislature: the people acting through referendum. *Id.* at 817–18. The Court's analysis was also limited to the Elections Clause, which was relevant to crafting congressional districts, and not the Electors Clause. Even if *Arizona State Legislature* stands for the proposition that North Carolina *could* empower the Board to change the election rules in federal presidential and legislative races consistent with the Elections Clause and the Electors Clause, it is apparent that state law does not authorize what the Board did in this case, as Judge Osteen concluded below.

When the federal Constitution was ratified, the States retained sovereign powers, including the general police power to pass legislation. When a state exercises the police power to pass legislation, it is subject to the limits of its own constitution. And the responsibility of determining the meaning of a state's legislation belongs primarily to that state's judiciary. Federal courts must take great care not to intrude on that power. *See, e.g.*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

But those weighty principles do not control in this case. The federal Constitution did a bit more than just recognize the States' preexisting police powers. It also granted state legislatures a new power they did not possess before ratification: the power to set the rules for federal elections. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995). Because federal elections "arise from the Constitution itself," any "state authority to regulate election to those offices . . . had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001). When the state legislatures exercise this power, they are exercising a federal constitutional power that cannot be usurped by other branches of state government. *See Arizona State Legislature*, 576 U.S. at 807–08 (distinguishing between state legislative powers "derived from the people of the State" and those with a "source in the Federal Constitution" (quoting *Hawke*, 253 U.S. at 229–30)).

Thus, a "significant departure from the [State's] legislative scheme for appointing Presidential electors" or for electing members of the federal Congress "presents a federal constitutional question" we must answer. *Bush v. Gore*, 431 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) (concluding Virginia court misinterpreted state law in order to reach a federal

question); Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 487–88 (7th ed. 2015) (discussing how federal courts can answer antecedent state-law questions to reach federal legal questions). Although we hesitate to opine on state law, the constitutional delegation of power to the state legislature means that "the text of [state] election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush*, 431 U.S. at 112–13 (Rehnquist, C.J., concurring). This obligates us to analyze state law to determine if the federal Constitution was violated. The integrity of federal elections is not a simple state-law matter.

In the present case, the Board does not even try to argue that the consent decree is consistent with the Bipartisan Elections Act of 2020. Instead, the Board argues that it had authority to change the election rules under N.C. Gen. Stat. § 163-27.1, which gives it authority to "exercise emergency powers to conduct an election in a district where the normal schedule is disrupted by" a "natural disaster," "extremely inclement weather," or "an armed conflict."

We agree with the district court that the Board's claim of statutory authority for its actions is meritless. Although the COVID-19 pandemic is a traumatic event for the country, it is not the type of "natural disaster" referred to by the statute. The statute envisions a *sudden* disaster "where the normal schedule for the election is disrupted" and the General Assembly does not have time to respond to it before a scheduled election. This limitation on the statute is reinforced by the fact that it grants the Board power to make changes only "in a district" where disruption occurs, suggesting the power is far more limited than the Board suggests. A good example of a disaster that would qualify is if a hurricane devastated

part of the State a couple of days before the election. Here, in contrast, the pandemic has been ongoing for months and the General Assembly convened to adopt a bill specifically intended to account for the conditions created by COVID-19. The Board cannot characterize COVID-19 as a sudden disaster "where the normal schedule for the election is disrupted."

Further, the statute envisions only minor departures from the General Assembly's election rules. The provision relied upon by the Board states that the Board "shall avoid unnecessary conflict" with other provisions of the State's election rules. N.C. Gen. Stat. § 163-27.1. Ignoring that language, the Board adopted major changes to the election law that clearly clash with the General Assembly's intent. Rarely will legislative intent be as straightforward as it is in this case. Just a few months ago, an overwhelming bipartisan majority of the General Assembly passed, and Governor Cooper signed, a bill setting the rules for the upcoming election in light of the COVID-19 pandemic. Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws § 2020-17. Although the General Assembly substantially expanded mail-in voting and made it easier, it also retained important limitations on that voting to combat potential voter fraud, a fight which "the State indisputably has a compelling interest" in winning. *Purcell*, 549 U.S. at 4 (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). For example, the General Assembly shifted from requiring absentee voters to secure *two* witnesses to requiring only one witness. Although that move expresses a desire to facilitate absentee voting, it also expresses a firm desire to retain a witness requirement. The Board produced an "unnecessary conflict" with state law in violation of N.C. Gen. Stat. § 163-27 by discarding

the witness requirement in favor of a process in which voters could self-certify their ballots. And the fact that the General Assembly maintained its deadline for the receipt of absentee ballots, even as other states were significantly extending them, evinces an intent not to allow absentee votes to be received well after the election. That the Board agreed to a receipt day far later than the General Assembly enacted produced another "unnecessary conflict" with state law in violation of N.C. Gen Stat. § 163-27.[5]

In light of such clear legislative intent, we cannot identify a significant rationale for the Board's decision to jettison the General Assembly's election rules in a lawsuit. As is unfortunately happening in just about every state where competitive elections are occurring, a series of lawsuits were brought to challenge the state legislature's choices. But considering the Supreme Court's well-established rule that courts should not change the rules of federal elections shortly before they begin, and the long list of cases upholding witness requirements and absentee ballot deadlines, these lawsuits had little chance of success. Indeed, a federal judge upheld the rules that the Board voided just two months ago. But a practically identical challenge was then brought in state court, and the Board showed little or no interest in defending the General Assembly's rules even after an initial federal-court victory. The Board agreed to a consent decree that bargained away important

[5] We also agree with Judge Osteen that the Board was not authorized to adopt these rule changes under N.C. Gen. Stat. § 163-22(a), which allows the Board to adopt rules and regulations for elections "so long as they do not conflict with any provisions" of the General Assembly's election rules. As discussed, the Board's changes in this case flatly contradict the rules set by the General Assembly. We also concur with Judge Osteen's conclusion that the Board did not have authority to change the election rules under N.C. Gen. Stat. § 163-22.2.

safeguards designed to protect the integrity of mail-in balloting. And Judge Osteen found that the Board negotiated this deal secretly and without consulting the legislative leaders, and it continued to advocate for the consent decree even though the leaders of the General Assembly intervened and vigorously objected to it. We therefore cannot conclude that the Board's actions constituted a good faith effort to implement the General Assembly's election law.

Finally, the Board's actions appear to violate the North Carolina Constitution, which establishes that the General Assembly is the "Legislature" and exercises all legislative power under state law. N.C. Const. art. II, § 1 ("The legislative power of the States shall be vested in the General Assembly . . . ."). And the North Carolina Supreme Court has established a nondelegation doctrine limiting the ability of the General Assembly to delegate legislative power to an executive agency. *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978) ("[T]he legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create."). Permissible delegations are limited to situations featuring "complex conditions involving numerous details with which the Legislature cannot deal directly." *N.C. Turnpike Auth. v. Pine Island, Inc.*, 143 S.E.2d 319, 323 (N.C. 1965). This makes the Board's broad interpretation of its emergency powers under N.C. Gen. Stat. § 163-27.1 even more implausible, as it would transform the provision from a clearly acceptable narrow delegation into a dubiously broad delegation.

We do not question the ability of the Board, or other state election boards, to make minor *ad hoc* changes to election rules in response to sudden emergencies. There is a long

history, both in North Carolina and in other states, of this power being exercised, and we understand that this power is important to the smooth functioning of elections. For example, if an electrical power outage halts voting in a precinct, we are confident that the Board could legally extend voting in that precinct.

But here the state legislature's constitutional power is at stake. If we refuse to defend the prerogative of the General Assembly to create election rules in a case as clear as this one, the power of the state legislatures under the Elections Clause and the Electors Clause will be at the mercy of other state-government actors. If non-representative state officials can disregard a clear mandate from the state legislature merely by *claiming* state-law authority, and if federal courts cannot review that claim, non-representative state officials will be able to strip the state legislatures of their federal constitutional power whenever they disagree with legislative priorities. The power of the people's representatives over elections will be jeopardized. That cannot be, and the Constitution does not allow it.

We also agree with the conclusion of both Judge Osteen and Judge Dever that plaintiffs have a good chance of vindicating their Equal Protection Clause claims on appeal. As noted, the Board changed the rules after voters had cast over 150,000 ballots in North Carolina. Plaintiffs' Equal Protection Clause claims thus raise serious questions about the scope of the Supreme Court's one-person, one-vote principle, and the attendant limitations on the ability of state officials to apply different rules to different voters in the same election. *See Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) ("'[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962))); *Reynolds v. Sims*, 377

U.S. 533, 555 (1964). By intentionally allowing votes to be cast that violate the Bipartisan Elections Act of 2020, defendants created serious questions under the Equal Protection Clause that should be considered on appeal. *Anderson v. United States*, 417 U.S. 211, 226 (1974) ("The right to an honest [vote count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." (internal quotation marks and citation omitted)). Because the Supreme Court has explained that the Equal Protection Clause protects against "the diluting effect of illegal ballots," *Gray v. Sanders*, 372 U.S. 368, 380 (1963), plaintiffs are likely to succeed on their appeal of this claim.

B.

Second, the plaintiffs will suffer irreparable injury absent an injunction pending appeal. The state legislative leaders will suffer irreparable injury if their carefully crafted legislation for the upcoming election is upset. Enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). As Chief Justice Roberts has explained, the inability to "employ a duly enacted statute" is an irreparable harm. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). This irreparable harm is especially poignant in the present case because the General Assembly adopted election rules *specifically for this election*, and allowing them to be disregarded until after the election renders their legislative action completely pointless. As to the Equal

Protection Clause claim, the injury the voter plaintiffs allege will necessarily come to pass in the absence of an injunction, thus causing irreparable injury.

C.

Finally, we conclude that the balance of the equities and the public interest favor plaintiffs. Endless suits have been brought to change the election rules set by state legislatures. *See* Stanford-MIT Healthy Elections Project, *COVID-Related Election Litigation Tracker* (last visited Oct. 19, 2020) (documenting 385 lawsuits filed against election rules this year), https://healthyelections-case-tracker.stanford.edu/. This pervasive jockeying threatens to undermine public confidence in our elections. And the constant court battles make a mockery of the Constitution's explicit delegation of this power to the state legislatures.

The Supreme Court has repeatedly made clear that courts should not change the rules of a federal election in the "weeks before an election." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). The district court denied injunctive relief solely on the basis of *Purcell*. We commend the district court for its good-faith effort to comply with *Purcell* in a year where courts are too often meddling in elections. However, we conclude the district court misunderstood how *Purcell* applies to this case. As the district court observed, *Purcell* has traditionally been applied against federal courts changing the rules shortly before elections. But there is no principled reason why this rule should not apply against interferences by state courts and agencies. The victim of a last-minute interference, whatever its source, is the same: a federal election. It is a difficult enough task

to conduct an election in the middle of a pandemic without proliferating lawsuits and constantly changing rules. Attempts to change election rules, whether facilitated in federal or state court, cause the "judicially-created confusion" that the *Purcell* principle is designed to guard against. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207. Whenever interference occurs, it incentivizes an avalanche of partisan and destabilizing litigation against election rules duly enacted by state legislatures. If *Purcell* did not apply in state courts, federal election rules would continue to be at the mercy of litigation and rushed, last-minute decisions by state judges in contravention of the delegation of authority by the Constitution under the Elections Clause.

Therefore, we conclude that *Purcell* requires granting an injunction pending appeal in this case. The status quo, properly understood, is an election run under the General Assembly's rules—the very rules that have been governing this election since it began in September. The Board and the North Carolina Superior Court for the County of Wake impermissibly departed from that status quo approving changes to the election rules in a consent decree in the middle of an election. Over 150,000 ballots had already been received when the Board changed the rules, and its actions have draped a shroud of uncertainty upon North Carolina's elections. Now that over half a million votes have been cast, allowing the Board's changes to go into effect would cause even greater turbulence. *Purcell* counsels in favor of ending this uncertainty by issuing injunctive relief pending appeal.

The General Assembly established rules for orderly elections amidst a pandemic. A wave of last-minute litigation in federal and state courts has resulted in North Carolina's rules changing repeatedly within a few weeks. This is happening as hundreds of thousands

of North Carolinians have already voted in important elections. This chaos must end. Because only an injunction pending appeal restores order, we would issue it.

* * *

This phenomenon is hardly unique to North Carolina. Around the country, courts are changing the rules of the upcoming elections at the last minute. It makes the promise of the Constitution's Elections and Electors Clauses into a farce. It disrespects the Supreme Court's repeated and clear command not to interfere so late in the day. This pernicious pattern is making the courts appear partisan, destabilizing federal elections, and undermining the power of the people to choose representatives to set election rules. By not issuing the injunction pending appeal we propose in Part IV, this court has missed an opportunity to stand athwart this destructive trend.

IV.

Our proposed injunction pending appeal would read as follows:

> Upon consideration of submissions relevant to appellants' emergency motions for injunctions pending appeal, we hereby grant the motions. The North Carolina Board of Elections is enjoined from eliminating the North Carolina General Assembly's requirement that absentee and mail-in ballots include a witness signature. *See* Elections Act of 2020, 2020 N.C. Sess. Laws § 2020-17. The North Carolina. Board of Elections is also enjoined from extending the deadline for the receipt of absentee and mail-in ballots beyond that established by the North Carolina General Assembly in N.C. Gen. Stat. § 163.231(b)(2)b. Under the General Assembly's law, such absentee and

mail-in ballots must be mailed and postmarked on or before Election Day, and they must be received within "three days after the election by 5:00 p.m." This order will remain in effect until these cases are finally decided on the merits, or until further notice by this Court.

NIEMEYER, Circuit Judge, dissenting:

I am pleased to join the dissenting opinion written by the panel majority. This case was originally assigned to a panel, but the work of the panel was hastily preempted by an en banc vote requested by the panel's dissenter after the panel majority had shared its views but before those views could be published.

To be sure, an en banc hearing may be requested at anytime. But the traditional practice of this court is for the assigned panel to hear a case and publish its opinion before the court considers whether to rehear the case en banc. Once in a rare while, the court has elected instead to hear a case en banc before consideration by a panel on the ground that the extraordinary importance of the matter justifies the participation of the entire court. But here, neither course was followed. The panel considered the case assigned to it and promptly exchanged votes on the outcome. Finding that he had been outvoted, the dissenting judge immediately initiated an en banc vote before the panel could even circulate its views to the entire court, let alone to the public. This departure from our traditional process strikes me as needlessly divisive — even considering the matter's time sensitive nature. I am saddened to see it, especially on a court that has taken such pride in its collegiality.

On the merits, the en banc action appears to be just as aggressive. After a substantial number of North Carolina voters — well over 1,000,000 as of October 17, 2020 — have voted and only two weeks before election day, the en banc majority now acts to permit changes to balloting rules. Such action by the en banc majority, as the panel majority has

explained, flies in the face of the principle that balloting rules for federal elections must not be changed shortly before elections — indeed, in this case, *during* an election.

I dissent from the preemptive en banc action in this case, and for the reasons given by the panel majority, I vote to grant the requested injunction against implementation of last minute ballot rules changes.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TIMOTHY K. MOORE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:20CV911
	)	
DAMON CIRCOSTA, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, et al.,	)	
	)	
Defendant-Intervenors.	)	

PATSY J. WISE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:20CV912
	)	
THE NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, et al.,	)	
	)	
Defendant-Intervenors.	)	

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

Presently before this court are two motions for a preliminary injunction in two related cases.

In the first case, Moore v. Circosta, No. 1:20CV911 ("Moore"), Plaintiffs Timothy K. Moore and Philip E. Berger (together, "State Legislative Plaintiffs"), Bobby Heath, Maxine Whitley, and Alan Swain (together, "Moore Individual Plaintiffs") seek an injunction against the enforcement and distribution of several Numbered Memoranda issued by the North Carolina State Board of Elections pertaining to absentee voting. (Moore v. Circosta, No. 1:20CV911, Mot. for Prelim. Inj. and Mem. in Supp. ("Moore Pls.' Mot.") (Doc. 60).)

In the second case, Wise v. North Carolina State Board of Elections, No. 1:20CV912 ("Wise"), Plaintiffs Patsy J. Wise, Regis Clifford, Samuel Grayson Baum, and Camille Annette Bambini (together, "Wise Individual Plaintiffs"), Donald J. Trump for President, Inc. ("Trump Campaign"), U.S. Congressman Gregory F. Murphy and U.S. Congressman Daniel Bishop (together, "Candidate Plaintiffs"), Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), and North Carolina Republican Party ("NCRP") seek an injunction against the enforcement and

distribution of the same Numbered Memoranda issued by the North Carolina State Board of Elections at issue in Moore. (Wise Pls.' Mem. in Supp. of Mot. to Convert the Temp. Restraining Order into a Prelim. Inj. ("Wise Pls.' Mot.") (Doc. 43).)

By this order, this court finds Plaintiffs have established a likelihood of success on their Equal Protection challenges with respect to the State Board of Elections' procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots. This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.

I. BACKGROUND

A. Parties

1. Moore v. Circosta (1:20CV911)

State Legislative Plaintiffs Timothy K. Moore and Philip E. Berger are the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate, respectively. (Moore v. Circosta, No. 1:20CV911, Compl. for Declaratory and Injunctive Relief ("Moore

Compl.") (Doc. 1) ¶¶ 7-8.) Individual Plaintiffs Bobby Heath and Maxine Whitley are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by the State Board of Elections on September 21, 2020, and September 17, 2020, respectively. (Id. ¶¶ 9-10.) Plaintiff Alan Swain is a resident of Wake County, North Carolina, who is running as a Republican candidate to represent the State's Second Congressional District. (Id. ¶ 11.)

Executive Defendants include Damon Circosta, Stella Anderson, Jeff Carmon, III, and Karen Brinson Bell are members of the State Board of Elections ("SBE"). (Id. ¶¶ 12-15.) Executive Defendant Karen Brinson Bell is the Executive Director of SBE. (Id. ¶ 15.)

Intervenor-Defendants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz ("Alliance Intervenors") are plaintiffs in the related state court action in Wake County Superior Court. (Moore v. Circosta, No. 1:20CV911 (Doc. 28) at 15.)[1] Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and

[1] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

Caren Rabinowitz are individual voters who are concerned they will be disenfranchised by Defendant SBE's election rules, (id.), and North Carolina Alliance for Retired Americans ("NC Alliance") is an organization "dedicated to promoting the franchise and ensuring the full constitutional rights of its members . . . ." (Id.)

2. Wise v. N.C. State Bd. of Elections (1:20CV912)

Individual Plaintiffs Patsy J. Wise, Regis Clifford, Camille Annette Bambini, and Samuel Grayson Baum are registered voters in North Carolina. (Wise v. N.C. State Bd. of Elections, No. 1:20CV912, Compl. for Declaratory and Injunctive Relief ("Wise Compl.") (Doc. 1) ¶¶ 25-28.) Wise has already cast her absentee ballot for the November 3, 2020 election by mail, "in accordance with statutes, including the Witness Requirement, enacted by the General Assembly." (Id. ¶ 25.) Plaintiffs Clifford, Bambini, and Baum intend to vote in the November 3, 2020 election and are "concern[ed] that [their] vote[s] will be negated by improperly cast or fraudulent ballots." (Id. ¶¶ 26-28.)

Plaintiff Trump Campaign represents the interests of President Donald J. Trump, who is running for re-election. (Id. ¶¶ 29-30.) Together, Candidate Plaintiffs Trump Campaign, U.S. Congressman Daniel Bishop, and U.S. Congressman Gregory F.

Murphy are candidates who will appear on the ballot for re-election in the November 3, 2020 general election. (Id. ¶¶ 29-32.)

Plaintiff RNC is a national political party, (id. ¶¶ 33-36), that seeks to protect "the ability of Republican voters to cast, and Republican candidates to receive, effective votes in North Carolina elections and elsewhere," (id. ¶ 37), and avoid diverting resources and spending significant amounts of resources educating voters regarding confusing changes in election rules, (id. ¶ 38).

Plaintiff NRSC is a national political party committee that is exclusively devoted to electing Republican candidates to the U.S. Senate. (Id. ¶ 40.) Plaintiff NRCC is the national organization of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives. (Id. ¶ 41.) Plaintiff NRCP is a North Carolina state political party organization that supports Republican candidates running in North Carolina elections. (Id. ¶¶ 44-45.)

Executive Defendant North Carolina SBE is the agency responsible for the administration of the elections laws of the State of North Carolina. (Id. ¶ 46.) As in Moore, included as Executive Defendants are Damon Circosta, Stella Anderson, Jeff

Carmon, III, and Karen Brinson Bell of the North Carolina SBE. (Id. ¶¶ 47-50.)

Alliance Intervenors from Moore are also Intervenor-Defendants in Wise. (1:20CV912 (Doc. 22).)

B. Factual Background

1. This Court's Decision in *Democracy*

On August 4, 2020, this court issued an order in a third related case, Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) ("the August Democracy Order"), that "left the One-Witness Requirement in place, enjoined several rules related to nursing homes that would disenfranchise Plaintiff Hutchins, and enjoined the rejection of absentee ballots unless the voter is provided due process." (Id. at *1.) As none of the parties appealed that order, the injunctive relief is still in effect.

2. Release of the Original Memo 2020-19

In response to the August Democracy Order, on August 21, 2020, SBE officials released guidance for "the procedure county boards must use to address deficiencies in absentee ballots." (Numbered Memo 2020-19 ("Memo 2020-19" or "the original Memo") (Moore v. Circosta, No. 1:20CV911, Moore Compl. (Doc. 1) Ex. 3 – NC State Bd. of Elections Mem. ("Original Memo 2020-19") (Doc. 1-4) at 2.) This guidance instructed county boards regarding

multiple topics. First, it instructed county election boards to "accept [a] voter's signature on the container-return envelope if it appears to be made by the voter . . . [a]bsent clear evidence to the contrary," even if the signature is illegible. (Id.) The guidance clarified that "[t]he law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record," as "[v]erification of the voter's identity is completed through the witness requirement." (Id.)

Second, the guidance sorted ballot deficiencies into two categories: curable and uncurable deficiencies. (Id. at 3.) Under this version of Memo 2020-19, a ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. (Id.) A ballot error could not be cured, and instead, was required to be spoiled, in the case of all other listed deficiencies, including a missing signature, printed name, or address of the witness; an incorrectly placed witness or assistant signature; or an unsealed or re-sealed envelope. (Id.) Counties were required to notify voters in writing regarding any ballot deficiency – curable or incurable - within one day of the county identifying the defect and to enclose either a cure affidavit or a new ballot, based on the type of deficiency at issue. (Id. at 4.)

In the case of an incurable deficiency, a new ballot could be issued only "if there [was] time to mail the voter a new ballot . . . [to be] receive[d] by Election Day." (Id. at. 3) If a voter who submitted an uncurable ballot was unable to receive a new absentee ballot in time, he or she would have the option to vote in person on Election Day. (Id. at 4.)

If the deficiency was curable by a cure affidavit, the guidance stated that the voter must return the cure affidavit by no later than 5 p.m. on Thursday, November 12, 2020. (Id.)

3. Rescission of Numbered Memo 2020-19

The State began issuing ballots on September 4, 2020, marking the beginning of the election process. (Wise, No. 1:20CV912, Wise Pls.' Mot. (Doc. 43).) On September 11, 2020, SBE directed counties to stop notifying voters of deficiencies in their ballot, as advised in Memo 2020-19, pending further guidance from SBE. (Moore, No. 1:20CV911, Moore Pls.' Mot. (Doc. 60) Ex. 3, Democracy Email Chain (Doc. 60-4) at 6.)

4. Revision of Numbered Memo 2020-19

On September 22, over two weeks after the State began issuing ballots, SBE issued a revised Numbered Memo 2020-19, which set forth a variety of new policies not implemented in the original Memo 2020-19. (Numbered Memo 2020-19 ("the Revised Memo" or "Revised Memo 2020-19") (Moore v. Circosta, No.

1:20CV911 (Doc. 36) Ex. 3, Revised Numbered Memo 2020-19 ("Revised Memo 2020-19") (Doc. 36-3).) In subsequent litigation in Wake County Superior Court, SBE advised the court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen." (Moore v. Circosta, No. 1:20CV911, Exec. Defs.' Br. in Supp. of Joint Mot. for Entry of Consent Judgment ("SBE State Court Br.") (Doc. 68-1) at 15.) Moreover, on September 28, 2020, during a status conference with a district court in the Eastern District of North Carolina prior to transfer to this court, counsel for Defendant SBE stated that Defendant SBE issued the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (Moore v. Circosta, No. 1:20CV911, Order Granting Mot. for Temp. Restraining Order ("TRO") (Doc. 47) at 9.) At that time, counsel for SBE indicated that they had not yet submitted the Revised Memo 2020-19 to this court, "but that it was on counsel's list to get [it] done today." (Id.) (internal quotations omitted.) On September 28, 2020, Defendant SBE filed the Revised Memo 2020-19 with this court in the Democracy action. (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1).)

The revised guidance modified which ballot deficiencies fell into the curable and uncurable categories. Unlike the original Memo 2020-19, the Revised Memo advised that ballots missing a witness or assistant name or address, as well as ballots with a missing or misplaced witness or assistant signature, could be cured via voter certification. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 3.) According to the revised guidance, the only deficiencies that could not be cured by certification, and thus required spoliation, were where the envelope was unsealed or where the envelope indicated the voter was requesting a replacement ballot. (Id. at 4.)

The cure certification in Revised 2020-19 required voters to sign and affirm the following:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

The revised guidance also extended the deadline for civilian absentee ballots to be received to align with that for

military and overseas voters. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) Under the original Memo 2020-19, in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked, by Election Day, by 5:00 p.m. on November 6, 2020. (Moore v. Circosta, No. 1:20CV911, Original Memo 2020-19 (Doc. 1-4) at 5 (citing N.C. Gen. Stat. § 163-231(b)).) Under the Revised Memo 2020-19, however, a late civilian ballot would be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) This is the same as the deadline for military and overseas voters, as indicated in the Original Memo 2020-19. (Id.)[2]

5. Numbered Memoranda 2020-22 and 2020-23

SBE issued two other Numbered Memoranda on September 22, 2020, in addition to Revised Numbered Memo 2020-19.

First, SBE issued Numbered Memo 2020-22, the purpose of which was to further define the term postmark used in Numbered Memo 2020-19. (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 3,

[2] In Democracy N. Carolina v. N.C. State Board of Elections, No. 1:20CV457, an order is entered contemporaneously with this Memorandum Opinion and Order enjoining certain aspects of the Revised Memo 2020-19.

N.C. State Bd. of Elections Mem. ("Memo 2020-22") (Doc. 1-3) at 2.) Numbered Memo 2020-22 advised that although "[t]he postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. . . . [T]he USPS does not always affix a postmark to a ballot return envelope." (Id.) Recognizing that SBE now offers "BallotTrax," a system in which voters and county boards can track the status of a voter's absentee ballot, SBE said "it is possible for county boards to determine when a ballot was mailed even if does not have a postmark." (Id.) Moreover, SBE recognized that commercial carriers offer tracking services that document when a ballot was deposited with the commercial carrier. (Id.) For these reasons, the new guidance stated that a ballot would be considered postmarked by Election Day if it had a postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.)

Second, SBE issued Numbered Memo 2020-23, which provides "guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots." (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 4, N.C. State Bd. of

Elections Mem. ("Memo 2020-23") (Doc. 1-4) at 2.) Referring to N.C. Gen. Stat. § 163-226.3(a)(5),[3] which prohibits any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections, (id.), Numbered Memo 2020-23 confirms that "an absentee ballot may not be left in an unmanned drop box." (Id.) The guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.)

At the same time, the guidance advises county boards that "[f]ailure to comply with the logging requirement, or delivery or an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot." (Id. at 3.) Instead, the guidance advises the county board that they "may . . . consider

[3] The Memoranda incorrectly cites this statute as N.C. Gen. Stat. § 163-223.6(a)(5).

the delivery of a ballot . . . in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

6. Consent Judgment in North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections

On August 10, 2020, NC Alliance, the Defendant-Intervenors in the two cases presently before this court, filed an action against SBE in North Carolina's Wake County Superior Court challenging, among other voting rules, the witness requirement for mail-in absentee ballots and rejection of mail-in absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election. (Moore v Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 15.)

On August 12, 2020, Philip Berger and Timothy Moore, Plaintiffs in Moore, filed a notice of intervention as of right in the state court action and became parties to that action as intervenor-defendants on behalf of the North Carolina General Assembly. (Id. at 16.)

On September 22, 2020, SBE and NC Alliance filed a Joint Motion for Entry of a Consent Judgment with the superior court. (Id.) Philip Berger and Timothy Moore were not aware of this "secretly-negotiated" Consent Judgment, (Wise Pls.' Mot. (Doc. 43) at 6), until the parties did not attend a previously

scheduled deposition, (Democracy v. N.C. Bd. of Elections, No. 1:20CV457 (Doc. 168) at 73.)

Among the terms of the Consent Judgment, SBE agreed to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine days after Election Day, to implement the cure process established in Revised Memo 2020-19, and to establish separate mail in absentee ballot "drop off stations" at each early voting site and county board of elections office which were to be staffed by county board officials. (Moore v. Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 16.)

In its filings with the state court, SBE frequently cited this court's decision in Democracy as a reason for why the Wake County Superior Court Judge should accept the Consent Judgment. SBE argued that a cure procedure for deficiencies related to the witness requirement were necessary because "[w]itness requirements for absentee ballots have been shown to be, broadly speaking, disfavored by the courts," (id. at 26), and that "[e]ven in North Carolina, a federal court held that the witness requirement could not be implemented as statutorily authorized without a mechanism for voters to have adequate notice of and [an opportunity to] cure materials [sic] defects that might keep their votes from being counted," (id. at 27). SBE argued that,

"to comply with the State Defendants' understanding of the injunction entered by Judge Osteen, the State Board directed county boards of elections not to disapprove any ballots until a new cure procedure that would comply with the injunction could be implemented," (id. at 30), and that ultimately, the cure procedure introduced in Revised Memo 2020-19 as part of the consent judgment would comply with this injunction. (Id.) SBE indicated that it had notified the federal court of the cure mechanism process on September 22, 2020, (id.), although this court was not made aware of the cure procedure until September 28, 2020, (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1)), the day before the processing of absentee ballots was scheduled to begin on September 29, 2020, (Moore v. Circosta, No. 20CV911 Transcript of Oral Argument ("Oral Argument Tr.")(Doc. 70) at 109.)

On October 2, 2020, the Wake County Superior Court entered the Stipulation and Consent Judgment. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1).) Among its recitals, which Defendant SBE drafted and submitted to the judge as is customary in state court, (Oral Argument Tr. (Doc. 70) at 91), the Wake County Superior Court noted this court's preliminary injunction in Democracy, finding,

> WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North

> Carolina enjoined the State Board from "the "disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-cv-00457-WO-JLW (M.D.N.C. Aug. 4, 2020) (Osteen, J.). ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." Id.

(State Court Consent Judgment (Doc. 45-1) at 6.)[4]

7. Numbered Memoranda 2020-27, 2020-28, and 2020-29

In addition to the Numbered Memoranda issued on September 22, 2020, as part of the consent judgment in the state court case, SBE has issued three additional numbered memoranda.

First, on October 1, 2020, SBE issued Numbered Memo 2020-27, which was issued in response to this court's order in Democracy regarding the need for parties to attend a status conference to discuss Numbered Memo 2020-19. (Moore v. Circosta, No. 1:20CV911 (Doc. 40-2) at 2.) The guidance advises county boards that this court did not find Numbered Memo 2020-19:

> "consistent with the Order entered by this Court on August 4, 2020," and indicates that its preliminary injunction order should "not be construed as finding that the failure of a witness to sign the application and certificate as a witness is a deficiency which may

[4] An additional discussion of the facts related to SBE's use of this court's order in obtaining a Consent Judgment is set out in this court's order in Democracy v. North Carolina State Board of Elections, No. 1:20CV457 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure).

> be cured with a certification after the ballot has been returned."

(Id.) "In order to avoid confusion while related matters are pending in a number of courts," the guidance advises that "[c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope." (Id.) In all other respects, SBE stated that Revised Numbered Memo 2020-19 remains in effect. (Id.)

Second, on October 4, 2020, SBE issued Numbered Memo 2020-28, which states that both versions of Numbered Memo 2020-19, as well as Numbered Memoranda 2020-22, 2020-23, and 2020-27 "are on hold until further notice" following the temporary restraining order entered in the instant cases on October 3, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 60-5) at 2.) Moreover, the guidance reiterated that "[c]ounty boards that receive an executed absentee container-return envelope with a deficiency shall take no action as to that envelope," including sending a cure notification or reissuing the ballot. (Id. at 2-3.) Instead, the guidance directs county boards to store envelopes with deficiencies in a secure location until further notice. (Id. at 3.) If, however, a county board had previously issued a ballot and the second envelope is returned

without any deficiencies, the guidance permits the county board to approve the second ballot. (Id.)

Finally, on October 4, 2020, SBE issued Numbered Memo 2020-29, which states that it provides "uniform guidance and further clarification on how to determine if the correct address can be identified if the witness's or assistant's address on an absentee container-return envelope is incomplete. (Wise, No. 1:20CV912 (Doc. 43-5).) First, the guidance clarifies that if a witness or assistant does not print their address, the envelope is deficient. (Id. at 2.) Second, the guidance states that failure to list a witness's ZIP code does not require a cure; a witness or assistant's address may be a post office box or other mailing address; and if the address is missing a city or state, but the county board can determine the correct address, the failure to include this information does not invalidate the container-return envelope. (Id.) Third, if both the city and ZIP code are missing, the guidance directs staff to determine whether the correct address can be identified. (Id.) If they cannot be identified, then the envelope is deficient. (Id.)

C. Procedural History

On September 26, 2020, Plaintiffs in Moore filed their action in the United States District Court for the Eastern District of North Carolina. (Moore Compl. (Doc. 1).) Plaintiffs

in Wise also filed their action in the United States District Court for the Eastern District of North Carolina on September 26, 2020. (Wise Compl. (Doc. 1).)

Alliance Intervenors filed a Motion to Intervene as Defendants in Moore on September 30, 2020, (Moore v. Circosta, No. 1:20CV911 (Doc. 27)), and in Wise on October 2, 2020, (Wise, No. 1:20CV912 (Doc. 21)). This court granted Alliance Intervenors' Motion to Intervene on October 8, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 67); Wise, No. 1:20CV912 (Doc. 49).)

The district court in the Eastern District of North Carolina issued a temporary restraining order in both cases on October 3, 2020, and transferred the actions to this court for this court's "consideration of additional or alternative injunctive relief along with any such relief in Democracy North Carolina v. North Carolina State Board of Elections . . . ." (Moore v. Circosta, 1:20CV911, TRO (Doc. 47) at 2; Wise, No. 1:20CV912 (Doc. 25) at 2.)

On October 5, 2020, this court held a Telephone Conference, (Moore v. Circosta, No. 1:20CV911, Minute Entry 10/05/2020; Wise, No. 1:20CV912, Minute Entry 10/05/2020), and issued an order directing the parties to prepare for a hearing on the temporary restraining order and/or a preliminary injunction and

to submit additional briefing, (Moore v. Circosta, No. 1:20CV911 (Doc. 51); Wise, No. 1:20CV912 (Doc. 30)). On October 6, 2020, Plaintiffs in Wise filed a Memorandum in Support of Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction, (Wise Pls.' Mot. (Doc. 43)), and Plaintiffs in Moore filed a Motion for a Preliminary Injunction and Memorandum in Support of Same, (Moore Pls.' Mot. (Doc. 60)). Defendant SBE filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, State Defs.' Resp. to Pls.' Mot. for Prelim. Inj. ("SBE Resp.") (Doc. 65); Wise, No. 1:20CV912 (Doc. 45).) Alliance Intervenors also filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, Proposed Intervenors' Mem. in Opp'n to Pls.' Mot. for a Prelim. Inj. ("Alliance Resp.") (Doc. 64); Wise, No. 1:20CV912 (Doc. 47).)[5]

This court held oral arguments on October 8, 2020, in which all of the parties in these two cases presented arguments with respect to Plaintiffs' motions for a preliminary injunction.

[5] Defendant SBE and Alliance Intervenors' memoranda filed in opposition to Plaintiffs' motions for a preliminary injunction in Moore are identical to those that each party filed in Wise. (Compare SBE Resp. (Doc. 65) and Alliance Resp. (Doc. 64) with Wise, No. 1:20CV912 (Doc. 45) and Wise, No. 1:20CV912 (Doc. 47).) For clarity and ease, this court will cite only to the briefs Defendant SBE and Alliance Intervenors filed in Moore in subsequent citations.

(Moore v. Circosta, No. 1:20CV911, Minute Entry 10/08/2020; Wise, No. 1:20CV912, Minute Entry 10/08/2020.)

This court has federal question jurisdiction over these cases under 28 U.S.C. § 1331. This matter is ripe for adjudication.

D. Preliminary Injunction Standard of Review

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Such an injunction "is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017).

II. ANALYSIS

Executive Defendants and Alliance Intervenors challenge Plaintiffs' standing to seek a preliminary injunction regarding their Equal Protection, Elections Clause, and Electors Clause claims. (Alliance Resp. (Doc. 64) at 14-18; SBE Resp. (Doc. 65) at 11-13.) Executive Defendants and Alliance Intervenors also challenge this court's ability to hear this action under abstention, (Alliance Resp. (Doc. 64) at 10-14; SBE Resp. (Doc.

65) at 10-11), Rooker-Feldman (Alliance Resp. (Doc. 64) at 13), and preclusion doctrines, (SBE Resp. (Doc. 65) at 7-10). Finally, Executive Defendants and Alliance Intervenors attack Plaintiffs' motions for preliminary injunction on the merits. (Alliance Resp. (Doc. 64) at 19-26; SBE Resp. (Doc. 65) at 13-18.)

Because Rooker-Feldman, abstention, and preclusion are dispositive issues, this court addresses them first, then addresses Plaintiffs' motions on standing and the likelihood of success on the merits.

As to each of these abstention doctrines, as will be explained further, this court's preliminary injunction order, (Doc. 124), in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, played a substantial role as relevant authority supporting SBE's request for approval, in North Carolina state court, of Revised Memo 2020-19 and the related Consent Judgment. (See discussion infra Part II.D.3.b.i.) As Berger, Moore, and SBE are all parties in Democracy, this court initially finds that abstention doctrines do not preclude this court's exercise of jurisdiction. This court's August Democracy Order was issued prior to the filing of these state court actions, and that Order was the basis of the subsequent grant of affirmative relief by the state court. This

court declines to find that any abstention doctrine would preclude it from issuing orders in aid of its jurisdiction, or as to parties appearing in a pending case in this court.

A. Rooker-Feldman Doctrine

Rooker-Feldman doctrine is a jurisdictional doctrine that prohibits federal district courts from "'exercising appellate jurisdiction over final state-court judgments.'" See Thana v. Bd. of License Comm'rs for Charles Cnty., 827 F.3d 314, 319 (4th Cir. 2016) (quoting Lance v. Dennis, 546 U.S. 459, 463 (2006) (per curiam)). The presence or absence of subject matter jurisdiction under Rooker-Feldman is a threshold issue that this court must determine before considering the merits of the case. Friedman's, Inc. v. Dunlap, 290 F.3d 191, 196 (4th Cir. 2002).

Although Rooker-Feldman originally limited only federal-question jurisdiction, the Supreme Court has recognized the applicability of the doctrine to cases brought under diversity jurisdiction:

> Rooker and Feldman exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, e.g., § 1330 (suits against foreign states), § 1331 (federal question), and § 1332 (diversity).

See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-92 (2005). Under the Rooker-Feldman doctrine, courts lack subject matter jurisdiction to hear "cases brought by [1] state-court losers complaining of [2] injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." Id. at 284. The doctrine is "narrow and focused." Thana, 827 F.3d at 319. "[I]f a plaintiff in federal court does not seek review of the state court judgment itself but instead 'presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court.'" Id. at 320 (quoting Skinner v. Switzer, 562 U.S. 521, 532 (2011)). Rather, "any tensions between the two proceedings should be managed through the doctrines of preclusion, comity, and abstention." Id. (citing Exxon, 544 U.S. at 292-93).

Moreover, "the Rooker-Feldman doctrine applies only when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself." Davani v. Va. Dep't of Transp., 434 F.3d 712, 713 (4th Cir. 2006); see also Hulsey v. Cisa, 947 F.3d 246, 250 (4th Cir. 2020) ("A plaintiff's injury at the hands of

a third party may be 'ratified, acquiesced in, or left unpunished by' a state-court decision without being 'produced by' the state-court judgment.") (internal citations omitted).

Here, Plaintiffs are challenging SBE's election procedures and seeking injunction of those electoral rules, not attempting to directly appeal results of a state court order. More importantly, however, the Fourth Circuit has previously found that a party is not a state court loser for purposes of Rooker-Feldman if "[t]he [state court] rulings thus were not 'final state-court judgments'" against the party bringing up the same issues before a federal court. Hulsey, 947 F.3d at 251 (quoting Lance, 546 U.S. at 463. In the Alliance state court case, Alliance brought suit against SBE. The Plaintiffs from this case were intervenors. They were not parties to the Settlement Agreement and were in no way properly adjudicated "state court losers." Given the Supreme Court's intended narrowness of the Rooker-Feldman doctrine, see Lance, 546 U.S. at 464, and Plaintiffs' failure to fit within the Fourth Circuit's definition of "state-court losers," this court will decline to abstain under the Rooker-Feldman doctrine.

B. Abstention

1. Colorado River Abstention

Abstention "is the exception, not the rule." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); see also id. at 817 (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Thus, this court's task "is not to find some substantial reason for the exercise of federal jurisdiction," but rather "to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' . . . to justify the surrender of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26 (1983).

First, and crucially for this case, the court must determine whether there are ongoing state and federal proceedings that are parallel. Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) ("The threshold question in deciding whether Colorado River abstention is appropriate is whether there are parallel suits."); Ackerman v. ExxonMobil Corp., 734 F.3d 237, 248 (4th Cir. 2013) (finding that abstention is exercised only "in favor of ongoing, parallel state proceedings" (emphasis added)). In this instance, the parties have failed to allege any ongoing state proceeding that this federal suit might interfere with. In fact, Plaintiffs in this case were excluded as parties in the Consent Judgment and are bringing independent claims in this federal court alleging

violations, inter alia, of the Equal Protection Clause. This court does not find that Colorado River abstention prevents it from adjudicating Equal Protection claims raised by parties who were not parties to the Consent Judgment.

2. Pennzoil Abstention

As alleged by Defendants, Pennzoil does dictate that federal courts should not "interfere with the execution of state judgments." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 (1987). However, in the very next sentence, the Pennzoil court caveats that this doctrine applies "[s]o long as those challenges relate to pending state proceedings." Id. In fact, in Pennzoil itself, the Court clarified that abstention was proper because "[t]here is at least one pending judicial proceeding in the state courts; the lawsuit out of which Texaco's constitutional claims arose is now pending before a Texas Court of Appeals in Houston, Texas." Id. at 14 n.13.

Abstention was also justified in Pennzoil because the Texas state court was not presented with the contested federal constitutional questions, and thus, "when [the subsequent] case was filed in federal court, it was entirely possible that the Texas courts would have resolved this case . . . without reaching the federal constitutional questions." Id. at 12. In the present case, Plaintiffs raised their constitutional claims

in the state court prior to the entry of the Consent Judgment. The state court, through the Consent Judgment and without taking evidence, adjudicated those claims as to the settling parties. The Consent Judgment is effective through the 2020 Election and specifies no further basis upon which Plaintiffs here may seek relief. As a result, there does not appear to be any relief available to Plaintiffs for the federal questions raised here. For these reasons, this court will also decline to abstain under Pennzoil.

3. Pullman Abstention

Pullman abstention can be exercised where: (1) there is "an unclear issue of state law presented for decision"; and (2) resolution of that unclear state law issue "may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." Educ. Servs., Inc. v. Md. State Bd. for Higher Educ., 710 F.2d 170, 174 (4th Cir. 1983); see also N.C. State Conference of NAACP v. Cooper, 397 F. Supp. 3d 786, 794 (M.D.N.C. 2019). Pullman does not apply here because any issues of state law are not, in this court's opinion, unclear or ambiguous. Alliance's brief in Moore posits that "whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos" are at the center of this case, thereby urging Pullman abstention.

(Alliance Resp. (Doc. 64 at 12.) SBE has undisputed authority to issue guidance consistent with state law and may issue guidance contrary to state law only in response to natural disasters – the court finds this, though ultimately unnecessary to the relief issued in this case, fairly clear. (See discussion supra at Part II.E.2.b.ii.) Moreover, this court has already expressly assessed and upheld the North Carolina state witness requirement, which is the primary state law at issue in this case. Democracy N. Carolina, 2020 WL 4484063, at *48.

Furthermore, Defendants and Intervenors would additionally need to show how "resolution of . . . state law issues pending in state court" would "eliminate or substantially modify the federal constitutional issues raised in Plaintiffs' Complaint." N.C. State Conference of NAACP, 397 F. Supp. 3d at 796. As Alliance notes, the Plaintiffs did not appeal the state court's conclusions, but sought relief in federal court – there is no state law issue pending in state court here. For all of these reasons, this court declines to abstain under Pullman.

C. Issue Preclusion

Collateral estoppel, or issue preclusion "refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,

whether or not the issue arises on the same or a different claim." New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001). The purpose of this doctrine is to "protect the integrity of the judicial process . . . ." Id. at 749 (internal quotations omitted).

Plaintiffs argue that issue preclusion does not bar their Equal Protection claims. Citing Arizona v. California, 530 U.S. 392 (2000), Plaintiffs in Wise argue that a negotiated settlement between parties, like the consent judgment between the Alliance Intervenors and Defendant SBE in Wake County Superior Court, does not constitute a final judgment for issue preclusion. (Wise Pls.' Mot. (Doc. 43) at 23.) Plaintiffs in Moore, citing In re Microsoft Corp. Antitrust Litig., 355 F.3d 322 (4th Cir. 2004), argue that issue preclusion cannot be asserted because the Individual Plaintiffs in Moore were not parties to the state court litigation that resulted in the consent judgment. (Moore Pls.' Mot. (Doc. 60) at 4.)

In response, Defendant SBE argues that, under North Carolina law, issue preclusion applies where (1) the issue is identical to the issue actually litigated and necessary to a prior judgment, (2) the prior action resulted in a final judgment on the merits, and (3) the plaintiffs in the latter action are the same as, or in privity with, the parties in the

earlier action, (SBE Resp. (Doc. 65) at 7), and the parties in these federal actions and those in the state actions are in privity under the third element of the test, (id. at 8).

This court finds that issue preclusion does not bar Plaintiffs' claims. In Arizona v. California, the Supreme Court held that "[i]n most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented." 530 U.S. at 414 (internal quotations omitted). Moreover, "settlements ordinarily occasion no issue preclusion . . . unless it is clear . . . that the parties intend their agreement to have such an effect." Id.

The Consent Judgment SBE and Alliance entered into does not clearly demonstrate that they intended their agreement to have an issue preclusive effect with regard to claims brought now by Plaintiffs in Moore and Wise. The language of the Consent Judgment demonstrates that it "constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit" and that "by signing this Stipulation and Consent Judgment, they are releasing any claims . . . that they might have against Executive Defendants." (State Court Consent Judgment (Doc. 45-1) at 14 (emphasis added).) Although

Timothy Moore and Philip Berger, State Legislative Plaintiffs in Moore, were Defendant-Intervenors in the NC Alliance action, they were not parties to the consent judgment. (Id.) Thus, because the plain language of the agreement did not expressly indicate an intention to preclude Plaintiffs Moore and Berger from litigating the issue in subsequent litigation, neither these State Legislative Plaintiffs, nor any other parties with whom they may or may not be in privity, are estopped from raising these claims now before this court.

D. Plaintiffs' Equal Protection Claims

Plaintiffs raise "two separate theories of an equal protection violation," – a "vote dilution claim, and an arbitrariness claim." (Oral Argument Tr. (Doc. 70) at 52; see also Wise Pls.' Mot. (Doc. 43) at 12-15.)

1. Voting Harms Prohibited by the Equal Protection Clause

Under the Fourteenth Amendment of the U.S. Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of several constitutional provisions that "protects the right of all qualified citizens to vote, in state as well as federal elections." Reynolds v. Sims, 377 U.S. 533, 554 (1964). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "to

the manner of its exercise," Bush v. Gore, 531 U.S. 98, 104 (2000), "lines may not be drawn which are inconsistent with the Equal Protection Clause . . . ." Id. at 105 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966)).

The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by "debasement or dilution of the weight of a citizen's vote," also referred to "vote dilution." Reynolds, 377 U.S. at 555. Courts find this harm arises where gerrymandering under a redistricting plan has diluted the "requirement that all citizens' votes be weighted equally, known as the one person, one vote principle," and resulted in one group or community's vote counting more than another's. Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 340 (4th Cir. 2016); see also Gill v. Whitford, 585 U.S. ____, ____, 138 S. Ct. 1916, 1930-31 (2018) (finding that the "harm" of vote dilution "arises from the particular composition of the voter's own district, which causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district"); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (finding that vote dilution occurred where congressional districts did not guarantee "equal representation for equal numbers of people"); Wright v. North Carolina, 787

F.3d 256, 268 (4th Cir. 2015) (invalidating a voter redistricting plan).

Second, the Court has found that the Equal Protection Clause is violated where the state, "[h]aving once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." Bush, 531 U.S. at 104-05 (2000); see also Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (internal citations omitted). This second theory of voting harms requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80 (1963). On the other hand, the state must protect against "the diluting effect of illegal ballots." Id. at 380. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," id., the vote

dilution occurs only where there is both "arbitrary and disparate treatment." Bush, 531 U.S. at 105. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. Id. at 106.

2. Standing to Bring Equal Protection Claims

In light of the harms prohibited by the Equal Protection Clause, this court must first consider whether Plaintiffs have standing to bring these claims.

For a case or controversy to be justiciable in federal court, a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir. 2005) (quoting Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 789 (4th Cir. 2004)).

The party seeking to invoke the federal courts' jurisdiction has the burden of satisfying Article III's standing requirement. Miller v. Brown, 462 F.3d 313, 316 (4th Cir. 2006). To meet that burden, a plaintiff must demonstrate three elements: (1) that the plaintiff has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the injury is fairly traceable to the challenged

conduct of the defendant; and (3) that a favorable decision is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

In multi-plaintiff cases, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester v. Laroe Estates, Inc., 581 U.S. ____, ____, 137 S. Ct. 1645, 1651 (2017). Further, if there is one plaintiff "who has demonstrated standing to assert these rights as his own," the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977).

In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," Baker, 369 U.S. at 206, so long as their claimed injuries are "distinct from a 'generally available grievance about the government,'" Gill, 138 S. Ct. at 1923 (quoting Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam)).

Defendant SBE and Alliance Intervenors argue that Individual Plaintiffs in Wise and Moore have not alleged a concrete and particularized injury under either of the two Equal Protection theories. (Alliance Resp. (Doc. 64) at 14-15; SBE Resp. (Doc. 65) at 12-13.)

First, under a vote dilution theory, they argue that courts have "repeatedly rejected this theory as a basis for standing, both because it is unduly speculative and impermissibly generalized." (Alliance Resp. (Doc. 64) at 17.) Second, under an arbitrary and disparate treatment theory, they argue that the injury is too generalized because the Numbered Memoranda apply equally to all voters across the state and that Plaintiffs "cannot claim an injury for not having to go through a remedial process put in place for other voters." (SBE Resp. (Doc. 65) at 12.)

Plaintiffs in Moore and Wise do not address standing for their Equal Protection claims in their memoranda in support of their motions for a preliminary injunction. (See Wise Pls.' Mot. (Doc. 43); Moore Pls.' Mot. (Doc. 60).) At oral argument held on October 8, 2020, however, counsel for the Moore Plaintiffs responded to Defendant SBE and Alliance Intervenor's standing arguments. (Oral Argument Tr. (Doc. 70) at 52-59.)

First, under a vote dilution theory, counsel argued that "the Defendants confuse a widespread injury with not having a personal injury," (id. at 53), and that the Supreme Court's decision in Reynolds demonstrates that "impermissible vote dilution occurs when there's ballot box stuffing," (id.), suggesting that each voter would have standing to sue under the

Supreme Court's precedent in Reynolds because their vote has less value. (Id.) Second, under an arbitrary and disparate treatment theory, counsel argued that Plaintiffs were subjected to the witness requirement and that "[t]here are burdens associated with that" which support a finding of an injury in fact. (Id. at 56.) Counsel argued the harm that is occurring is not speculative because, for example, voters have and will continue to fail to comply with the witness requirement, (id. at 55-56), and ballots will arrive between the third and ninth day following the election pursuant to the Postmark Requirement, (id. at 58). Moreover, counsel argued that the "regime" imposed by the state is arbitrary, citing limitations on assistance allowed to complete a ballot, compared to the lessened restrictions associated with the witness requirement under Numbered Memo 2020-19. (Id. at 59.)

This court finds that Individual Plaintiffs in Moore and Wise have not articulated a cognizable injury in fact for their vote dilution claims. However, all of the Individual Plaintiffs in Moore, and one Individual Plaintiff in Wise have articulated an injury in fact for an arbitrary and disparate treatment claim.

a. Vote Dilution

Although the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.'" Gill, 138 S. Ct. at 1930 (citing Reynolds, 377 U.S. at 561), the Court has expressly held that "vote dilution" refers specifically to "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities, Abbott v. Perez, 585 U.S. ____, ____, 138 S. Ct. 2305, 2314 (2018) (internal quotations and modifications omitted) (emphasis added), a harm which occurs where "the particular composition of the voter's own district . . . causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district." Gill, 138 S. Ct. at 1931.

Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald J. Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances about the government, plaintiffs seek relief on behalf of their member voters that no more

directly and tangibly benefits them than it does the public at large.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); Paher v. Cegavske, Case No. 3:20-cv-0234-MMD-WGC, 2020 WL 2089813, at * 5 (D. Nev. Apr. 30, 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); Am. Civil Rights Union v. Martinez-Rivera, 166 F. Supp. 3d. 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters," Martel, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on

their racial identity or the district where they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury too generalized to give rise to a claim of vote dilution, and thus, neither Plaintiffs in Moore nor in Wise have standing to bring their vote dilution claims under the Equal Protection Clause.

b. Arbitrary and Disparate Treatment

In Bush, the Supreme Court held that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. at 104-05. Plaintiffs argue that they have been subjected to arbitrary and disparate treatment because they voted under one set of rules, and other voters, through the guidance in the Numbered Memoranda, will be permitted to vote invalidly under a different and unequal set of rules, and that this is a concrete and particularized injury. (Oral Argument Tr. (Doc. 70) at 70-71.)

For the purposes of determining whether Plaintiffs have standing, is it not "necessary to decide whether [Plaintiffs'] allegations of impairment of their votes" by Defendant SBE's actions "will, ultimately, entitle them to any relief," Baker, 369 U.S. at 208; whether a harm has occurred is best left to

this court's analysis of the merits of Plaintiffs' claims, (see discussion infra Section II.D.3). Instead, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Plaintiffs "are among those who have sustained it." Baker, 369 U.S. at 208.

This court finds that Individual Plaintiffs in Moore and one Individual Plaintiff in Wise have standing to raise an arbitrary and disparate treatment claim because their injury is concrete, particularized, and not speculative. Bobby Heath and Maxine Whitley, the Individual Plaintiffs in Moore, are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by SBE. (Moore Compl. (Doc. 1) ¶¶ 9-10.) In Wise, Individual Plaintiff Patsy Wise is a registered voter who cast her absentee ballot by mail. (Wise Compl. (Doc. 1) ¶ 25.)

If Plaintiffs Heath, Whitley, and Wise were voters who intended to vote by mail but who had not yet submitted their ballots, as is the case with the other Individual Plaintiffs in Wise, (Wise Compl. (Doc. 1) ¶¶ 26-28), or voters who had intended to vote in-person either during the Early Voting period or on Election Day, then they would not in fact have been impacted by the laws and procedures for submission of absentee ballots by mail and the complained-of injury would be merely "an

injury common to all other registered voters," Martel, 2020 WL 5755289, at *4. See also Donald J. Trump for President, Inc., 2020 WL 5626974, at *4 ("Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not."). Indeed, this court finds that Individual Plaintiffs Clifford, Bambini, and Baum in Wise do not have standing to challenge the Numbered Memoranda, because any "shock[]" and "serious concern[s]" they have that their vote "will be negated by improperly cast or fraudulent ballots," (Wise Compl. (Doc. 1) ¶¶ 26-28), is merely speculative until such point that they have actually voted by mail and had their ballots accepted, which Plaintiffs' Complaint in Wise does not allege has occurred. (Id.)

Yet, because Plaintiffs Heath, Whitley, and Wise have, in fact, already voted by mail, (Moore Compl. (Doc. 1) ¶¶ 9-10; Wise Compl. (Doc. 1) ¶ 25), their injury is not speculative. Under the Numbered Memoranda 2020-19, 2020-22, and 2020-23, other voters who vote by mail will be subjected to a different standard than that to which Plaintiffs Heath, Whitley, and Wise were subjected when they cast their ballots by mail. Assuming this is an injury that violates the Equal Protection Clause, Baker, 369 U.S. at 208, the harm alleged by Plaintiffs is particular to voters in Heath, Whitley, and Wise's position,

rather than a generalized injury that any North Carolina voter could claim. For this reason, this court finds that Individual Plaintiffs Heath, Whitley, and Wise have standing to raise Equal Protection claims under an arbitrary and disparate treatment theory. Because at least one plaintiff in each of these multi-plaintiff cases has standing to seek the relief requested, the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights, 429 U.S. at 264 & n.9.

3. Likelihood of Success on the Merits

Having determined that Individual Plaintiffs have standing to bring their arbitrary and disparate treatment claims, this court now considers whether Plaintiffs' claims are likely to succeed on the merits. To demonstrate a likelihood of success on the merits, "[a] plaintiff need not establish a certainty of success, but must make a clear showing that he is likely to succeed at trial." Di Biase, 872 F.3d at 230.

a. Parties' Arguments

Plaintiffs argue that four policies indicated in the Numbered Memoranda are invalid under the Equal Protection Clause: (1) the procedure which allows ballots without a witness signature to be retroactively validated through the cure procedure indicated in Revised Numbered Memo 2020-19 ("Witness

Requirement Cure Procedure"); (2) the procedure which allows absentee ballots to be received up to nine days after Election Day if they are postmarked on Election Day, as indicated in Numbered Memo 2020-19 ("Receipt Deadline Extension"); and (3) the procedure which allows for anonymous delivery of ballots to unmanned drop boxes, as indicated in Numbered Memo 2020-23 ("Drop Box Cure Procedure"); (4) the procedure which allows ballots to be counted without a United States Postal Service postmark, as indicated in Numbered Memo 2020-22 ("Postmark Requirement Changes"). (Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124; Wise Pls.' Mot. (Doc. 43) at 13-14.)

Plaintiffs in Wise argue that the changes in these Memoranda "guarantee that voters will be treated arbitrarily under the ever-changing voting regimes." (Wise Pls.' Mot. (Doc. 43) at 11.) Similarly, Plaintiffs in Moore argue that the three Memoranda were issued "after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly," which deprives Plaintiffs "of the Equal Protection Clause's guarantee because it allows for 'varying standards to determine what [i]s a legal vote." (Moore Compl. (Doc. 1) ¶ 90 (citing Bush, 531 U.S. at 107).)

In response, Defendants argue that the Numbered Memoranda will not lead to the arbitrary and disparate treatment of

ballots prohibited by the Supreme Court's decision in Bush v. Gore, 531 U.S. 98 (2000). Defendant SBE argues that the consent judgment and Numbered Memos do "precisely what Bush contemplated: It establishes uniform and adequate standards for determining what is a legal vote, all of which apply statewide, well in advance of Election Day. Indeed, the only thing stopping uniform statewide standards from going into effect is the TRO entered in these cases." (SBE Resp. (Doc. 65) at 17.) Moreover, Defendant SBE argues that the consent judgment "simply establishes uniform standards that help county boards ascertain which votes are lawful," and "in no way lets votes be cast unlawfully." (Id. at 18.)

Alliance Intervenors argue that the Numbered Memos "apply equally to all voters," (Alliance Resp. (Doc. 64) at 18), and "Plaintiffs have not articulated, let alone demonstrated, how their right to vote – or anyone else's – is burdened or valued unequally," (id. at 19). Moreover, Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues because, "[e]lection procedures often change after voting has started to ensure that the fundamental right to vote is protected." (Id. at 20.)

Both Defendant SBE and Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues, as election procedures often change after voting has started. (SBE Resp. (Doc. 65) at 18; Alliance Resp. (Doc. 64) at 20.) For example, Defendant SBE argues that "[i]f it is unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions." (SBE Resp. (Doc. 65) at 18 (citing N.C. Gen. Stat. § 163-166.01).) "Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps are implemented after voting begins." (Id.)

b. Analysis

This court agrees with the parties that an Equal Protection violation occurs where there is both arbitrary and disparate treatment. Bush, 531 U.S. at 105. This court also agrees with Defendants that not all disparate treatment rises to the level of an Equal Protection violation. As Defendant SBE argues, the General Assembly has empowered SBE to make changes to voting policies and procedures throughout the election, including extending hours at polling places or adjusting voting in

response to natural disasters. (SBE Resp. (Doc. 65) at 18.) Other federal courts have upheld changes to election procedures even after voting has commenced. For example, in 2018, a federal court enjoined Florida's signature matching procedures and ordered a cure process after the election. Democratic Exec. Comm. of Fla. V. Detzner, 347 F. Supp. 3d 1017, 1031 (N.D. Fla. 2018), appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm., 950 F.3d 790 (11th Cir. 2020). Similarly, a Georgia federal court in 2018 ordered a cure process in the middle of the absentee and early voting periods. Martin v. Kemp, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), appeal dismiss sub nom. Martin v. Sec'y of State of Ga., No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018).

A change in election rules that results in disparate treatment shifts from constitutional to unconstitutional when these rules are also arbitrary. The ordinary definition of the word "arbitrary" refers to matters "[d]epending on individual discretion" or "involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." Arbitrary, Black's Law Dictionary (11th ed. 2019). This definition aligns with the Supreme Court's holding in Reynolds and Bush, that the State must ensure equal treatment of voters both at the time it grants citizens the

right to vote and throughout the election. Bush, 531 U.S. at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); Reynolds, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

The requirement that a state "grant[] the right to vote on equal terms," Bush, 531 U.S. at 104, includes protecting the public "from the diluting effect of illegal ballots," Gray, 372 U.S. at 380. To fulfill this requirement, a state legislature must define the manner in which voting should occur and the minimum requirements for a valid, qualifying ballot. In North Carolina, the General Assembly has passed laws defining the requirements for permissible absentee voting, N.C. Gen. Stat. § 163-226 et seq., including as recently as this summer, when it modified the one-witness requirement, 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). As this court found in its order issuing a preliminary injunction in Democracy, these requirements reflect a desire by the General Assembly to prevent voter fraud resulting from illegal voting practices. Democracy N. Carolina, 2020 WL 4484063, at *35.

A state cannot uphold its obligation to ensure equal treatment of all voters at every stage of the election if another body, including SBE, is permitted to contravene the duly enacted laws of the General Assembly and to permit ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting. Any guidance SBE adopts must be consistent with the guarantees of equal treatment contemplated by the General Assembly and Equal Protection.

Thus, following this precedent, and the ordinary definition of the word "arbitrary," this court finds that SBE engages in arbitrary behavior when it acts in ways that contravene the fixed rules or procedures the state legislature has established for voting and that fundamentally alter the definition of a validly voted ballot, creating "preferred class[es] of voters." Gray, 372 U.S. at 380.

This definition of arbitrariness does not require this court to consider whether the laws enacted by the General Assembly violate other provisions in the North Carolina or U.S. Constitution or whether there are better public policy alternatives to the laws the General Assembly has enacted. These are separate inquiries. This court's review is limited to

whether the challenged Numbered Memos are consistent with state law and do not create a preferred class or classes of voters.

i. Witness Requirement Cure Procedure

This court finds Plaintiffs have demonstrated a likelihood of success on the merits with respect to their Equal Protection challenge to the Witness Requirement Cure Procedure in Revised Memo 2020-19.

Under the 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a), a witnessed absentee ballot must be "marked . . . in the presence of at least one [qualified] person . . . ." This clear language dictates that the witness must be (1) physically present with the voter, and (2) present at the time the ballot is marked by the voter.

Revised Memo 2020-19 counsels that ballots missing a witness signature may be cured where voters sign and affirm the following statement:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

This "cure" affidavit language makes no mention of whether a witness was in the presence of the voter at the time that the voter cast their ballot, which is the essence of the Legislature's Witness Requirement. 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). In fact, a voter could truthfully sign and affirm this statement and have their ballot counted by their county board of elections without any witness becoming involved in the process.[6] Because the effect of this affidavit is to

[6] Plaintiffs do not challenge the use of the cure affidavit for ballot deficiencies generally, aside from arguing that the cure affidavit circumvents the statutory Witness Requirement. (See Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124.) Although not raised by Plaintiffs, this courts finds the indefiniteness of the cure affidavit language troubling as a means of correcting even curable ballot deficiencies.

During oral arguments, Defendants did not and could not clearly define what it means to "vote," (see, e.g., Oral Argument Tr. (Doc. 70) at 130-32), which is all that the affidavit requires voters to attest that they have done. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) Under the vague "I voted" language used in the affidavit, a voter who completed their ballot with assistance from an unauthorized individual; a voter who does not qualify for voting assistance; or a voter who simply delegated the responsibility for completing their ballot to another person could truthfully sign this affidavit, although all three acts are prohibited under state law. See N.C. Gen. Stat. § 163-226.3(a)(1). Because the cure affidavit does not define what it means to vote, voters are permitted to decide what that means for themselves.

This presents additional Equal Protection concerns. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray, 372 U.S. at 380. Because the affidavit does not serve as an adequate means to ensure that voters did not engage in unauthorized ballot casting procedures, inevitably, not all

(Footnote continued)

eliminate the statutorily required witness requirement, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Revised Memo 2020-19 is arbitrary.

Based on counsel's statements at oral arguments, Defendant SBE may contend that the guidance in Revised Memo 2020-19 is not arbitrary because it was necessary to resolve the Alliance state court action. (Oral Argument Tr. (Doc. 70) at 105 ("Our reading then of state law is that the Board has the authority to make adjustments in emergencies or as a means of settling protracted litigation until the General Assembly reconvenes.").) However, Defendant SBE's arguments to the state court judge and the court in the Eastern District of North Carolina belie that assertion, as they advised the state court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen," (SBE State Court Br. (Doc. 68-1) at 15), and they advised the court in the Eastern District of North Carolina that they had issued

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voters will be held to the same standards for casting their ballot. This is, by definition, arbitrary and disparate treatment inconsistent with existing state law.

This court's concerns notwithstanding, however, Plaintiffs do not challenge the use of a cure affidavit in other contexts, so this court will decline to enjoin the use of a cure affidavit beyond its application as an alternative for compliance with the Witness Requirement.

the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (TRO (Doc. 47) at 9.) As this court more fully explains in its order issued in Democracy, this court finds that Defendant SBE improperly used this court's August Democracy Order to modify the witness requirement. Democracy N. Carolina, No. 1:20CV457 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure). Because Defendant SBE acted improperly in that fashion, this court declines to accept an argument now that elimination of the witness requirement was a rational and justifiable basis upon which to settle the state lawsuit. Furthermore, it is difficult to conceive that SBE was authorized to resolve a pending lawsuit that could create a preferred class of voters: those who may submit an absentee ballot without a witness under an affidavit with no definition of the meaning of "vote."

This court also finds Plaintiffs have demonstrated a likelihood of success on the merits in proving disparate treatment may result as a result of the elimination of the Witness Requirement. Individual Plaintiffs Wise, Heath, and Whitley assert that they voted absentee by mail, including complying with the Witness Requirement. (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10.) Whether because a voter

inadvertently cast a ballot without a witness or because a voter was aware of the "cure" procedure and thus, willfully did not cast a ballot with a witness, there will be voters whose ballots are cast without a witness. Accordingly, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Memo 2020-19 creates disparate treatment.

Thus, because Plaintiffs have demonstrated a likelihood of success on the merits with respect to arbitrary and disparate treatment that may result from under Witness Requirement Cure Procedure in Revised Memo 2020-19, this court finds Plaintiffs have established a likelihood of success on their Equal Protection claim.

ii. Receipt Deadline Extension

This court finds that Plaintiffs are likely to succeed on their Equal Protection challenge to the Receipt Deadline Extension in Revised Memo 2020-19.

Under N.C. Gen. Stat. § 163-231(b), in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked by Election Day, by 5:00 p.m. on November 6, 2020. The guidance in Revised Memo 2020-19 extends the time in which absentee ballots must be returned, allowing a late civilian

ballot to be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020 (Revised Memo 2020-19 (Doc. 36-3) at 5.)

Alliance Intervenors argue that, "[t]o the extent Numbered Memo 2020-22 introduces a new deadline, it affects only the counting of ballots for election officials after Election Day has passed – not when voters themselves must submit their ballots. All North Carolina absentee voters still must mail their ballots by Election Day." (Alliance Resp. (Doc. 64) at 21.)

This court disagrees, finding Plaintiffs have demonstrated a likelihood of success on the merits in proving that this change contravenes the express deadline established by the General Assembly, by extending the deadline from three days after Election Day, to nine days after Election Day. Moreover, it results in disparate treatment, as voters like Individual Plaintiffs returned their ballots within the time-frame permitted under state law, (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10), but other voters whose ballots would otherwise not be counted if received three days after Election Day, will now have an additional six days to return their ballot.

Because Plaintiffs have demonstrated a likelihood of success on the merits in proving arbitrary and disparate treatment may result under the Receipt Deadline Extension, this court finds Plaintiffs have established a likelihood of success on the merits of their Equal Protection claim.

iii. Drop Box Cure Procedure

Plaintiffs have failed to establish a likelihood of success, however, on their Equal Protection challenge to the Drop Box Cure Procedure indicated in Numbered Memo 2020-23. (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4).)

N.C. Gen. Stat. § 163-226.3(a)(5) makes it a felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections.

"Because of this provision in the law," and the need to ensure compliance with it, SBE recognized in Memo 2020-23 that, "an absentee ballot may not be left in an unmanned drop box," (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), and directed county boards which have a "drop box, slot, or similar container at their office" for other business purposes to place a "sign indicating that absentee ballots may not be deposited in it." (Id.)

Moreover, the guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.) The guidance also advises county boards that "[f]ailure to comply with the logging requirement, or delivery or an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot." (Id. at 3.) Instead, the guidance advises the county board that they "may . . . consider the delivery of a ballot . . . in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

Plaintiffs argue that this guidance "undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots," (Moore Compl. (Doc. 1) ¶ 68), and "effectively allow[s] voters to use drop boxes for absentee ballots," (Wise Pls.' Mot. (Doc. 43) at 13), and thus, violates the Equal

Protection Clause, (Moore Compl. (Doc. 1) ¶ 93). This court disagrees.

Although Numbered Memo 2020-23 was released on September 22, 2020, (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), the guidance it contains is not new. Consistent with the guidance in Numbered Memo 2020-23, SBE administrative rules adopted on December 1, 2018, require that any person delivering a ballot to a county board of elections office provide:

> (1) Name of voter;
>
> (2) Name of person delivering ballot;
>
> (3) Relationship to voter;
>
> (4) Phone Number (if available) and current address of person delivering ballot;
>
> (5) Date and time of delivery of ballot; and
>
> (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative as defined in [N.C. Gen. Stat § 163-226(f)] or verifiable legal guardian as defined in [N.C. Gen. Stat. § 163-226(e)].

8 N.C. Admin. Code 18.0102 (2018). Moreover, the administrative rule states that "the county board of elections may consider the delivery of a ballot in accordance with this Rule in conjunction with other evidence in determining whether the container-return envelope has been properly executed according to the requirements of [N.C. Gen. Stat. § 163-231]," (id.), and that

"[f]ailure to comply with this Rule shall not constitute evidence sufficient in and of itself to establish that the voter did not lawfully vote his or her ballot." (Id.)

Because the guidance contained in Numbered Memo 2020-23 was already in effect at the start of this election as a result of SBE's administrative rules, Individual Plaintiffs were already subject to it at the time that they cast their votes. Accordingly, because all voters were subject to the same guidance, Plaintiffs have not demonstrated a likelihood of success on the merits in proving disparate treatment.

It is a closer issue with respect to whether Plaintiffs have demonstrated a likelihood of success on the merits in proving that the rules promulgated by Defendant SBE are inconsistent with N.C. Gen. Stat. § 163-226.3(a)(5).

This statute makes it a felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. Id. It would seem logically inconsistent that the General Assembly would criminalize this behavior, while at the same time, permit ballots returned by unauthorized third parties to be considered valid. Yet, upon review of the legislative history, this court finds the felony statute has been in force since 1979, 1979 N.C.

Sess. Laws Ch. 799 (S.B. 519) § 4, https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/1979-1980/sl1979-799.pdf (last visited Oct. 13, 2020), and in its current form since 2013. 2013 N.C. Sess. Laws 381 (H.B. 589) § 4.6.(a).

That the General Assembly, by not taking legislative action, and instead, permitted SBE's administrative rule and the General Assembly's statute to coexist for nearly two years and through several other elections undermines Plaintiffs' argument that Defendant SBE has acted arbitrarily. For this reason, this court finds that Plaintiffs have not demonstrated a likelihood of success on the merits in proving the arbitrariness of the guidance in Numbered Memo 2020-23 and accordingly, Plaintiffs have failed to establish a likelihood of success on their Equal Protection challenge to Numbered Memo 2020-23.

If the General Assembly believes that SBE's administrative rules are inconsistent with its public policy goals, they are empowered to pass legislation which overturns the practice permitted under the administrative rule.

iv. Postmark Requirement Changes

Similarly, this court finds that Plaintiffs have failed to establish likelihood of success on the merits with respect to their Equal Protection challenge to the Postmark Requirement

Changes in Numbered Memo 2020-22. (Wise, 1:20CV912, Memo 2020-22 (Doc. 1-3).)

Under Numbered Memo 2020-22, a ballot will be considered postmarked by Election Day if it has a USPS postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.) This court finds that these changes are consistent with N.C. Gen. Stat. § 163-231(b)(2)b, which does not define what constitutes a "postmark," and instead, merely states that ballots received after 5:00 p.m. on Election Day may not be accepted unless the ballot is "postmarked and that postmark is dated on or before the day of the . . . general election . . . and are received by the county board of elections not later than three days after the election by 5:00 p.m."

In the absence of a statutory definition for postmark, this court finds Plaintiffs have not demonstrated a likelihood of success on the merits in proving that Numbered Memo 2020-22 is inconsistent with N.C. Gen. Stat. § 163-231(b)(2)b, and thus, arbitrary. If the General Assembly believes that the Postmark Requirement Changes indicated in Memo 2020-22 are inconsistent with its public policy goals, they are empowered to pass

legislation which further specifies the definition of a "postmark." In the absence of such legislation, however, this court finds that Plaintiffs have failed to establish a likelihood of success on the merits of their Equal Protection challenge.

4. Irreparable Harm

In addition to a likelihood of success on the merits, a plaintiff must also make a "clear showing that it is likely to be irreparably harmed absent preliminary relief" in order to obtain a preliminary injunction. UBS Fin. Servs. Inc. v. Carilion Clinic, 880 F. Supp. 2d 724, 733 (E.D. Va. 2012) (quoting Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 347 (4th Cir. 2009)). Further, an injury is typically deemed irreparable if monetary damages are inadequate or difficult to ascertain. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994), abrogated on other grounds by Winter, 555 U.S. at 22. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014). "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin th[ese] law[s]." Id.

The court therefore finds Plaintiffs have demonstrated a likelihood of irreparable injury regarding the Equal Protection challenges to the Witness Requirement and the Receipt Deadline Extension.

5. Balance of Equities

The third factor in determining whether preliminary relief is appropriate is whether the plaintiff demonstrates "that the balance of equities tips in his favors." Winter, 555 U.S. at 20.

The Supreme Court's decision in Purcell v. Gonzalez, 549 U.S. 1 (2006), urges that this court should issue injunctive relief as narrowly as possible. The Supreme Court has made clear that "lower federal courts should ordinarily not alter the election rules on the eve of an election," Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ____, ____, 140 S. Ct. 1205, 1207 (2020) (per curiam), as a court order affecting election rules will progressively increase the risk of "voter confusion" as "an election draws closer." Purcell, 549 U.S. at 4-5; see also Texas All. for Retired Americans v. Hughs, ____ F.3d ____, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) ("The principle . . . is clear: court changes of election laws close in time to the election are strongly disfavored."). This year alone, the Purcell doctrine of noninterference has been invoked by federal courts in cases involving witness requirements and cure provisions during COVID-19, Clark v. Edwards, Civil Action No. 20-283-SDD-RLB, 2020 WL 3415376, at *1-2 (M.D. La. June 22, 2020); the implementation of an all-mail election plan developed by county election officials, Paher, 2020 WL 2748301, at *1, *6; and the use of college IDs for

voting, Common Cause v. Thomsen, No. 19-cv-323-JDP, 2020 WL 5665475, at *1 (W.D. Wis. Sept. 23, 2020) – just to name a few.

Purcell is not a per se rejection of any injunctive relief close to an election. However, as the Supreme Court's restoration of the South Carolina witness requirement last week illustrates, a heavy thumb on the scale weighs against changes to voting regulations. Andino v. Middleton, ____ S. Ct. ____, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the Purcell] principle and this Court's precedents.").

In this case, there are two SBE revisions where this court has found that Plaintiffs are likely to succeed on the merits. First, the Witness Requirement Cure Procedure, which determines whether SBE will send the voter a cure certification or spoil the ballot and issue a new one. This court has, on separate grounds, already enjoined the Witness Requirement Cure Procedure in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457 (M.D.N.C. Oct. 24, 2020) (enjoining witness cure procedure). Thus, the issue of injunctive relief on the Witness Requirement Cure Procedure is moot at this time. Nevertheless, in the absence of relief in Democracy, it seems likely that SBE's creation of "preferred class[es] of voters",

Gray, 372 U.S. at 380, with elimination of the witness requirement and the cure procedure could merit relief in this case.

Ripe for this court's consideration is the Receipt Deadline Extension, which contradicts state statutes regarding when a ballot may be counted. Ultimately, this court will decline to enjoin the Receipt Deadline Extension, in spite of its likely unconstitutionality and the potential for irreparable injury. The Purcell doctrine dictates that this court must "ordinarily" refrain from interfering with election rules. Republican Nat'l Comm., 140 S. Ct. at 1207. These issues may be taken up by federal courts after the election, or at any time in state courts and the legislature. However, in the middle of an election, less than a month before Election Day itself, this court cannot cause "judicially created confusion" by changing election rules. Id. Accordingly, this court declines to impose a preliminary injunction because the balance of equities weighs heavily against such an injunction.

E. Plaintiffs' Electors Clause and Elections Clause Claims

As an initial matter, this court will address the substantive issues of the Electors Clause and the Elections Clause together. The Electors Clause of the U.S. Constitution requires "[e]ach State shall appoint, in such Manner as the

Legislature thereof may direct, a Number of Electors" for President. U.S. Const. art. II, § 1, cl. 2. Plaintiffs in Wise argue that, in order to "effectuate" this Electors requirement, "the State must complete its canvas of all votes cast by three weeks after the general election" under N.C. Gen. Stat. § 163-182.5(c). (Wise Pls.' Mot. (Doc. 43) at 15.) Plaintiffs argue that (1) the extension of the ballot receipt deadline and (2) the changing of the postmark requirement "threaten to extend the process and threaten disenfranchisement," as North Carolina "must certify its electors by December 14 or else lose its voice in the Electoral College. (Id.)

The meaning of "Legislature" within the Electors Clause can be analyzed in the same way as "Legislature" within the Elections Clause. For example,

> As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause. Not only were both these clauses adopted during the 1787 Constitutional Convention, but the clauses share a "considerable similarity.
>
> . . . .
>
> . . . [T]he Court finds that the term "Legislature" is used in a sufficiently similar context in both clauses to properly afford the term an identical meaning in both instances.

Donald J. Trump for President, Inc. v. Bullock, No. CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020). Nor do

Plaintiffs assert any difference in the meaning they assign to "Legislature" and its authority between the two Clauses.

This court finds that all Plaintiffs lack standing under either Clause. The discussion infra of the Elections Clause applies equally to the Electors Clause.

1. Elections Clause

a. Standing

The Elections Clause standing analysis differs in Moore and Wise, though this court ultimately arrives at the same conclusion in both cases.

i. Standing in Wise

In Wise, Plaintiffs are private parties clearly established by Supreme Court precedent to have no standing to contest the Elections Clause in this manner. Plaintiffs are individual voters, a campaign committee, national political parties, and two Members of the U.S. House of Representatives. Even though Plaintiffs are part of the General Assembly, they bring their Elections Clause claim alleging an institutional harm to the General Assembly. Though the Plaintiffs claim to have suffered "immediate and irreparable harm", (Wise Compl. (Doc. 1) ¶¶ 100, 109), this does not establish standing for their Elections Clause claim or Electors Clause claim. See Corman v. Torres, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("[T]he Elections Clause

claims asserted in the verified complaint belong, if they belong to anyone, only to the . . . General Assembly."). The Supreme Court has already held that a private citizen does not have standing to bring an Elections Clause challenge without further, more particularized harms. See Lance, 549 U.S. at 441-42 ("The only injury [private citizen] plaintiffs allege is that . . . the Elections Clause . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."). Plaintiffs allege no such extra harms, and in fact, do not speak to standing in their brief at all.

ii. Standing in Moore

In Moore, both Plaintiff Moore and Plaintiff Berger are leaders of chambers in the General Assembly. The Plaintiffs allege harm stemming from SBE flouting the General Assembly's institutional authority. (Wise Pls.' Mot. (Doc. 43) at 16.) However, as Proposed Intervenors NC Alliance argue, "a subset of legislators has no standing to bring a case based on purported harm to the Legislature as a whole." (Alliance Resp. (Doc. 64) at 15.) The Supreme Court has held that legislative plaintiffs can bring Elections Clause claims on behalf of the legislature itself only if they allege some extra, particularized harm to

themselves – or some direct authority from the whole legislative body to bring the legal claim. Specifically, the Supreme Court found a lack of standing where "[legislative plaintiffs] have alleged no injury to themselves as individuals"; where "the institutional injury they allege is wholly abstract and widely disperse"; and where the plaintiffs "have not been authorized to represent their respective Houses of Congress in this action." Raines v. Byrd, 521 U.S. 811, 829 (1997).

An opinion in a very similar case in the Middle District of Pennsylvania is instructive:

> [T]he claims in the complaint rest solely on the purported usurpation of the Pennsylvania General Assembly's exclusive rights under the Elections Clause of the United States Constitution. We do not gainsay that these [two] Senate leaders are in some sense aggrieved by the Pennsylvania Supreme Court's actions. But that grievance alone does not carry them over the standing bar. United States Supreme Court precedent is clear — a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.

Corman, 287 F. Supp. 3d at 567. In the instant case, the two members of the legislature do not allege individual injury. The institutional injury they allege is dispersed across the entire General Assembly. The crucial element, then, is whether Moore and Berger are authorized by the General Assembly to represent its interests. The General Assembly has not directly authorized Plaintiffs to represent its interests in this specific case. See

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 802 (2015) (finding plaintiff "[t]he Arizona Legislature" had standing in an Elections Clause case only because it was "an institutional plaintiff asserting an institutional injury" which "commenced this action after authorizing votes in both of its chambers"). Moore and Berger argued the general authorization in N.C. Gen. Stat. Section 120-32.6(b), which explicitly authorizes them to represent the General Assembly "[w]henever the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action in any State or federal court." N.C. Gen. Stat. § 120-32.6(b). The text of § 120-32.6 references N.C. Gen. Stat. § 1-72.2, which further specifies that Plaintiffs will "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." (emphasis added).

Neither statute, however, authorizes them to represent the General Assembly as a whole when acting as plaintiffs in a case such as this one. See N.C. State Conference of NAACP v. Berger, 970 F.3d 489, 501 (4th Cir. 2020) (granting standing to Moore and Berger in case where North Carolina law was directly challenged, distinguishing "execution of the law" from "defense

of a challenged act"). The facts of this case do not match up with this court's prior application of N.C. Gen. Stat. § 1-72.2, which has been invoked where legislators defend the constitutionality of legislation passed by the legislature when the executive declines to do so. See Fisher-Borne v. Smith, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014). Furthermore, to the extent Plaintiffs Moore and Berger disagree with the challenged provisions of the Consent Judgment, they have not alleged they lack the authority to bring the legislature back into session to negate SBE's exercise of settlement authority. See N.C. Gen. Stat. § 163-22.2.

Thus, even Plaintiff Moore and Plaintiff Berger lack standing to proceed with the Elections Clause claim. Nonetheless, this court will briefly address the merits as well.

2. Merits of Elections Clause Claim

a. The 'Legislature' May Delegate to SBE

The Elections Clause of the U.S. Constitution states that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs assert that the General Assembly instituted one such time/place/manner rule regarding the election by passing H.B. 1169. Therefore, Plaintiffs argue, SBE "usurped the General Assembly's authority" when it "plainly modif[ied]" what the General Assembly had implemented. (Wise Pls.' Mot. (Doc. 43) at 14.)

The Elections Clause certainly prevents entities other than the legislature from unilaterally tinkering with election logistics and procedures. However, Plaintiffs fail to establish that the Elections Clause forbids the legislature itself from voluntarily delegating this authority. The "Legislature" of a state may constitutionally delegate the power to implement election rules – even rules that may contradict previously enacted statutes.

State legislatures historically have the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause. Ariz. State Legislature, 576 U.S. at 816 (noting that, despite the Elections

Clause, "States retain autonomy to establish their own governmental processes"). Here, the North Carolina General Assembly has delegated some authority to SBE to contravene previously enacted statutes, particularly in the event of certain "unexpected circumstances." (SBE Resp. (Doc. 65) at 15.)

The General Assembly anticipated that SBE may need to implement rules that would contradict previously enacted statutes. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter." (emphasis added)). Plaintiffs claim that "[t]he General Assembly could not, consistent with the Constitution of the United States, delegate to the Board of Elections the power to suspend or re-write the state's election laws." (Wise Compl. (Doc. 1) ¶ 97.) This would mean that the General Assembly could not delegate any emergency powers to SBE. For example, if a hurricane wiped out all the polling places in North Carolina, Plaintiffs' reading of the Constitution would prohibit the legislature from delegating to SBE any power to contradict earlier state law regarding election procedures. (See SBE Resp. (Doc. 65) at 15).

As courts have adopted a broad understanding of "Legislature" as written in the Elections Clause, see Corman,

287 F. Supp. 3d at 573, it follows that a valid delegation from the General Assembly allowing SBE to override the General Assembly in certain circumstances would not be unconstitutional. See Donald J. Trump for President, 2020 WL 5810556, at *12 (finding that the legislature's "decision to afford" the Governor certain statutory powers to alter the time/place/manner of elections was legitimate under the Elections Clause).

b. Whether SBE Exceeded Legitimate Delegated Powers

The true question becomes, then, whether SBE was truly acting within the power legitimately delegated to it by the General Assembly. Even Proposed Intervenors NC Alliance note that SBE's actions "could . . . constitute plausible violations of the Elections Clause if they exceeded the authority granted to [SBE] by the General Assembly." (Alliance Resp. (Doc. 64) at 19.)

SBE used two sources of authority to enter into the Consent Agreement changing the laws and rules of the election process after it had begun: N.C. Gen. Stat. § 163-22.2 and § 163-27.1.

i. SBE's Authority to Avoid Protracted Litigation

First, this court finds that, while N.C. Gen. Stat. § 163-22.2 authorizes agreements in lieu of protracted litigation, it

does not authorize the extensive measures taken in the Consent Agreement:

> In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of this Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.

N.C. Gen. Stat. § 163-22.2. While the authority delegated under this statute is broad, it limits SBE's powers to implementing rules that "do not conflict with any provisions of this Chapter." Moreover, this power appears to exist only "until such time as the General Assembly convenes." Id. By eliminating the witness requirement, SBE implemented a rule that conflicted directly with the statutes enacted by the North Carolina legislature.

Moreover, SBE's power to "enter into agreement with the courts in lieu of protracted litigation" is limited by the

language "until such time as the General Assembly convenes." Id. Plaintiffs appear to have a remedy to what they contend is an overreach of SBE authority by convening.

ii. SBE's Power to Override the Legislature in an Emergency

Second, Defendants rely upon N.C. Gen. Stat. § 163-27.1. That statute provides:

> (a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following:
>
> (1) A natural disaster.
>
> (2) Extremely inclement weather.
>
> (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States.

N.C. Gen. Stat. § 163-27.1(a)(1-3). As neither (a)(2) or (3) apply, the parties agree that only (a)(1), a natural disaster, is at issue in this case. On March 10, 2020, the Governor of North Carolina declared a state of emergency as a result of the spread of COVID-19. N.C. Exec. Order No. 116 (March 10, 2020). Notably, the Governor did not declare a disaster pursuant to N.C. Gen. Stat. § 166A-19.21. Instead, on March 25, 2020, it was the President of the United States who declared a state of disaster existed in North Carolina:

> I have determined that the emergency conditions in the State of North Carolina resulting from the Coronavirus Disease 2019 (COVID-19) pandemic beginning on January 20, 2020, and continuing, are of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of North Carolina.

Notice, North Carolina; Major Disaster and Related Determinations, 85 Fed. Reg. 20701 (Mar. 25, 2020) (emphasis added). The President cited the Stafford Act as justification for declaring a major disaster. See 42 U.S.C. § 5122(2). Notably, neither the Governor's Emergency Proclamation nor the Presidential Proclamation identified COVID-19 as a natural disaster.

On March 12, 2020, the Executive Director of SBE, Karen Brinson Bell ("Bell"), crafted an amendment to SBE's Emergency Powers rule. Bell's proposed rule change provided as follows:

> (a) In exercising his or her emergency powers and determining whether the "normal schedule" for the election has been disrupted in accordance with G.S. ~~163A-750~~, 163-27.1, the Executive Director shall consider whether one or more components of election administration has been impaired. The Executive Director shall consult with State Board members when exercising his or her emergency powers if feasible given the circumstances set forth in this Rule.
>
> (b) For the purposes of G.S. ~~163A-750~~, 163-27.1, the following shall apply:
>
> (1) A natural disaster or extremely inclement weather include ~~a:~~ any of the following:

(A) Hurricane;
(B) Tornado;
(C) Storm or snowstorm;
(D) Flood;
(E) Tidal wave or tsunami;
(F) Earthquake or volcanic eruption;
(G) Landslide or mudslide; or
(H) Catastrophe arising from natural causes ~~resulted~~ and resulting in a disaster declaration by the President of the United States or the ~~Governor.~~ Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration issued under G.S. 166A-19.3(19). "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident. The disease epidemic or other public health incident must make [~~that makes~~] it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting [~~place or that creates~~] place, create a significant risk of physical harm to persons in the voting place, or [~~that~~] would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf at 5 (proposed changes in strikethroughs, or underline.) Shortly after submitting the rule change, effective March 20, 2020, SBE declared COVID-19 a natural disaster, attempting to invoke its authority under the Emergency Powers Statute, § 163-27.1. However, the Rules Review Commission subsequently unanimously rejected Bell's proposed rule change, finding in part that there was a "lack of statutory authority as set forth in G.S. 150B-21.9(a)(1)," and more specifically, that "the [SBE] does not have the authority to

expand the definition of 'natural disaster' as proposed." North Carolina Office of Administrative Hearings, Rules Review Commission Meeting Minutes (May 21, 2020), at 4 https://files.nc.gov/ncoah/Minutes-May-2020.pdf.

In a June 12, 2020 letter, the Rules Review Commission Counsel indicated that Bell had responded to the committee's findings by stating "that the agency will not be submitting a new statement or additional findings," and, as a result, "the Rule [was] returned" to the agency. Letter re: Return of Rule 08 NCAC 01.0106 (June 12, 2020) at 1 https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf. Despite the Rules Review Commission's rejection of Bell's proposed changes, on July 17, 2020, Bell issued an Emergency Order with the following findings:

> 18. N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106 authorize me to exercise emergency powers to conduct an election where the normal schedule is disrupted by a catastrophe arising from natural causes that has resulted in a disaster declaration by the President of the United States or the Governor, while avoiding unnecessary conflict with the laws of North Carolina. The emergency remedial measures set forth here are calculated to offset the nature and scope of the disruption from the COVID-19 disaster.
>
> 19. Pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106(a) and (b), and after consultation with the State Board, I have determined that the COVID-19 health emergency is a catastrophe arising from natural causes — i.e., a naturally occurring virus — resulting in a disaster declaration by the President of the United States and a declaration of a state of

> emergency by the Governor, and that the disaster has already disrupted and continues to disrupt the schedule and has already impacted and continues to impact multiple components of election administration.

(Democracy N. Carolina, No. 1:20CV457 (Doc. 101-1) ¶¶ 18-19.) This directly contradicted the Rules Commission's finding that such a change was outside SBE's authority. In keeping with Bell's actions, the State failed to note in argument before this court that Bell's proposal had been rejected explicitly because SBE lacked statutory authority to exercise its emergency powers. In fact, at the close of a hearing before this court, the State made the following arguments:

> but the Rules Review Commission declined to let it go forward as a temporary rule, I think I'm remembering this right, without stating why. But it did not go through.
>
> In the meantime, the president had declared a state of national -- natural disaster declaration. The president had declared a disaster declaration, so under the existing rule, the powers kicked into place.
>
> . . . .
>
> And the statute that does allow her to make those emergency decisions says in it, in exercising those emergency decisions says in it, in exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this chapter, this chapter being Chapter 163 of the election laws.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 109.) This court agrees with the Rules Review Commission: re-writing the definition of "natural disaster" is

outside SBE's rulemaking authority. N.C. Gen. Stat. § 163-27.1(a)(1) limits the Executive Director's emergency powers to those circumstances where "the normal schedule for the election is disrupted by any of the following: (1) A natural disaster."[7]

Nor does the President's major disaster proclamation define COVID-19 as a "natural disaster" – at least not as contemplated by the state legislature when § 163-27.1 (or its predecessor, § 163A-750) was passed. To the contrary, the Emergency Powers are limited to an election "in a district where the normal schedule for the election is disrupted." N.C. Gen. Stat. § 163-27.1(a). Nothing about COVID-19 disrupts the normal schedule for the election as might be associated with hurricanes, tornadoes, or other natural disasters.

(a) Elimination of the Witness Requirement

Finally, even if, as SBE argues, it had the authority to enter into a Consent Agreement under its emergency powers, it did not have the power to contradict statutory authority by eliminating the witness requirement. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of

[7] Notably, Bell makes no finding as to whether this is a Type I, II, or III Declaration of Disaster, which would in turn limit the term of the Disaster Declaration. See, e.g., N.C. Gen. Stat. § 166A-19.21.

this Chapter.") (emphasis added). The legislature implemented a witness requirement and SBE removed that requirement. This is certainly an unnecessary conflict with the legislature's choices.

By the State's own admission, any ballots not subject to witnessing would be unverified. The State of North Carolina argued as much in urging this court to uphold the one-witness requirement:

> As Director Bell testified, it is a basic bedrock principle of elections that you have some form of verifying that the voter is who they say they are; voter verification. As she said, when a voter comes into the poll, whether that is on election day proper or whether it is by –
>
> . . . .
>
> Obviously, you can't do that when it is an absentee ballot. Because you don't see the voter, you can't ask the questions. So the witness requirement, the purpose of it is to have some means that the person who sent me this is the person -- the person who has sent this absentee ballot is who they say they are. That's the purpose of the witness requirement. The witness is witnessing that they saw this person, and they know who they are, that they saw this person fill out the ballot and prepare the ballot to mail in. And that is the point of it.
>
> And, as Director Bell testified, I mean, we've heard a lot from the Plaintiffs about how many states do not have witness requirements. And that is true, that the majority of states, I think at this point, do not have a witness requirement.
>
> But as Director Bell testified, they're going to have one of two things. They're going to either have

> the witness requirement, or they're going to have a means of verifying the signature . . . .
>
> One thing -- and I think that is unquestionably an important State interest. Some means of knowing that this ballot that says it came from Alec Peters actually is from Alec Peters, because somebody else put their name down and said, yes, I saw Alec Peters do this. I saw him fill out this ballot.
>
> Otherwise, we have no way of knowing who the ballot -- whether the ballot really came from the person who voted. It is there to protect the integrity of the elections process, but it is also there to protect the voter, to make sure that the voter knows -- everybody knows that the voter is who they say they are, and so that somebody else is not voting in their place.
>
> Additionally, it is a tool for dealing with voter fraud.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 111-12.) In this hearing, the State continued on to note that "there needs to be some form of verification of who the voter is," which can "either be through a witness requirement or . . . through signature verification," but "it needs to be one or the other." (Id. at 115-16.) Losing the witness requirement, according to the State, would mean having "no verification." (Id. at 116.) Contravening a legislatively implemented witness requirement and switching to a system of "no verification," (id.), was certainly not a necessary conflict under § 163-27.1(a).

SBE argues that this court does not have authority to address how this switch contradicted state law and went outside its validly delegated emergency powers. This is a state law issue, as the dispute is over the extent of the Executive Director's authority as granted to her by the North Carolina Legislature. The State claims that, since a North Carolina Superior Court Judge has approved this exercise of authority, this court is obligated to follow that state court judgment. (SBE Resp. (Doc. 65) at 16.)

However, when the Supreme Court of a state has not spoken, federal courts must predict how that highest court would rule, rather than automatically following any state court that might have considered the question first. See Doe v. Marymount Univ., 297 F. Supp. 3d 573, 590 (E.D. Va. 2018) ("[F]ederal courts are not bound to follow state trial court decisions in exercising their supplemental jurisdiction."). The Fourth Circuit has addressed this issue directly in diversity jurisdiction contexts as well:

> a federal court sitting in diversity is not bound by a state trial court's decision on matters of state law. In King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), the Supreme Court upheld the Fourth Circuit's refusal to follow an opinion issued by a state trial court in a South Carolina insurance case. The Court concluded, "a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions

> should be taken as authoritative expositions of that State's 'law.'" Id. at 161, 68 S. Ct. 488.

Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 370 (4th Cir. 2005). In other words, this court's job is to predict how the Supreme Court of North Carolina would rule on the disputed state law question. Id. at 369 ("If the Supreme Court of [North Carolina] has spoken neither directly nor indirectly on the particular issue before us, [this court is] called upon to predict how that court would rule if presented with the issue.")(quotation omitted); Carter v. Fid. Life Ass'n, 339 F. Supp. 3d 551, 554 (E.D.N.C.), aff'd, 740 F. App'x 41 (4th Cir. 2018) ("Accordingly, the court applies North Carolina law, and the court must determine how the Supreme Court of North Carolina would rule."). In predicting how the North Carolina Supreme Court might decide, this court "consider[s] lower court opinions in [North Carolina], the teachings of treatises, and the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369. This court "follow[s] the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently." Town of Nags Head v. Toloczko, 728 F.3d 391, 397-98 (4th Cir. 2013).

In all candor, this court cannot conceive of a more problematic conflict with the provisions of Chapter 163 of the

North Carolina General Statutes than the procedures implemented by the Revised 2020-19 memo and the Consent Order. Through this abandonment of the witness requirement, some class of voters will be permitted to submit ballots with no verification. Though SBE suggests that its "cure" is sufficient to protect against voter fraud, the cure provided has few safeguards: it asks only if the voter "voted" with no explanation of the manner in which that vote was exercised. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) This court believes this is in clear violation of SBE's powers, even its emergency powers under N.C. Gen. Stat. § 163-27.1(a). However, none of this changes the fact that Plaintiffs in both Wise and Moore lack standing to challenge the legitimacy of SBE's election rule-setting power under either the Elections Clause or the Electors Clause.

III. CONCLUSION

This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations. For the foregoing reasons, this court finds that in

Moore v. Circosta, No. 1:20CV911, Plaintiffs' Motion for Preliminary Injunction should be denied. This court also finds that in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, the Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction should be denied.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction in Moore v. Circosta, No. 1:20CV911, (Doc. 60), is **DENIED.**

IT IS FURTHER ORDERED that Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, (Doc. 43), is **DENIED.**

This the 14th day of October, 2020.

William L. Osteen, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:20-CV-507-D

TIMOTHY K. MOORE, et al., Plaintiffs, v. DAMON CIRCOSTA, et al., Defendants.	)	**ORDER**

On September 26, 2020, the Speaker of the North Carolina House of Representatives, Timothy K. Moore ("Moore"), the President Pro Tempore of the North Carolina Senate, Philip E. Berger ("Berger"), Bobby Heath ("Heath"), Maxine Whitley ("Whitley"), and Alan Swain ("Swain"; collectively, "plaintiffs") filed this action against Damon Circosta ("Circosta") in his official capacity as chair of the North Carolina State Board of Elections ("NCSBOE"), Stella Anderson ("Anderson") in her official capacity as a NCSBOE member, Jeff Carmon III ("Carmon") in his official capacity as a NCSBOE member, and Karen Brinson Bell ("Bell"; collectively, "defendants") in her official capacity as Executive Director of the NCSBOE alleging claims under 42 U.S.C. §1983 and the Elections Clause and Equal Protection Clause of the United States Constitution [D.E. 1]. On the same date, plaintiffs moved for a temporary restraining order [D.E. 8] and filed a memorandum in support [D.E. 9]. Specifically, plaintiffs contend that three memoranda NCSBOE issued on September 22, 2020, in conjunction with settlement negotiations (and ultimately a settlement on October 2, 2020) in a state court lawsuit concerning absentee ballots, violate the Elections Clause because the memoranda are inconsistent with the North Carolina General statutes and improperly

usurp legislative power to regulate federal elections. Additionally, plaintiffs contend that the three memoranda violate the Equal Protection Clause because the memoranda arbitrarily change the standards to determine the legality of an individual's vote harming plaintiffs that have voted already, and that the policies dilute the votes of those plaintiffs. See [D.E. 8] 5–22.

In Wise v. North Carolina State Board of Elections, No. 5:20-cv-505-D (E.D.N.C.) [hereinafter Wise], various plaintiffs from throughout North Carolina and other entities seek relief, inter alia, under 42 U.S.C. § 1983 and the Elections Clause, Article II, § 1, and the Equal Protection Clause. On October 2, 2020, the state court approved the settlement in the state court lawsuit, and Numbered Memo 2020-22 and Numbered Memo 2020-23 became effective. On the same date, this court held a hearing on plaintiffs' motion for a temporary restraining order in this case and in Wise. As explained below, the court grants plaintiffs' motion for a temporary restraining order in this case and in Wise, and transfers this case and Wise to the Honorable William L. Osteen, Jr., United States District Judge for the Middle District of North Carolina, for Judge Osteen's consideration of additional or alternative injunctive relief along with any such relief in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20-CV-457 (M.D.N.C.).

I.

For purposes of this temporary restraining order only, the court draws the facts largely from plaintiffs' complaint in this case and in Wise.[1] On March 10, 2020, Governor Roy Cooper declared a state of emergency due to the COVID-19 pandemic. On March 26, 2020, Bell submitted a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" to North

[1] The court cites to the documents docketed in this case in the recitation of the facts. Any citations to the docket in Wise are underlined (e.g., [D.E. 3]) to distinguish a citation to the docket in this case.

Carolina's voting requirements. Bell asked that the General Assembly "[r]educe or eliminate the witness requirement" to "prevent the spread of COVID-19." See [D.E. 1-5]. Under N.C. Gen. Stat. § 163-231, to return a completed absentee ballot, a voter must have it witnessed and then mail or deliver the ballot in person, or have it delivered by commercial carrier. In addition, the voter, the voter's near relative, or the voter's verifiable legal guardian also can return the ballots in person. See N.C. Gen. Stat. § 163-231(b)(1).[2] The General Assembly has criminally prohibited any person other than the voter, the voter's near relative, or the voter's verifiable legal guardian from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. Gen. Stat. § 163-226.3(a)(5).[3]

On June 11, 2020, the General Assembly overwhelmingly passed bipartisan legislation, the "Bipartisan Elections Act," adjusting the voting rules for the November 2020 election. See Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Before passing the Bipartisan Elections Act, the General Assembly considered numerous proposals to adjust North Carolina election laws in light of the COVID-19 pandemic. For example, the General Assembly considered

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[2] Section 163-231(b)(1) states, in full: "Transmitting Executed Absentee Ballots to County Board of Elections. - The sealed container-return envelope in which executed absentee ballots have been placed shall be transmitted to the county board of elections who issued those ballots as follows: (1) All ballots issued under the provisions of this Article and Article 21A of this Chapter shall be transmitted by mail or by commercial courier service, at the voter's expense, or delivered in person, or by the voter's near relative or verifiable legal guardian and received by the county board not later than 5:00 p.m. on the day of the statewide primary or general election or county bond election. Ballots issued under the provisions of Article 21A of this Chapter may also be electronically transmitted." N.C. Gen. Stat. § 163-231(b)(1) (emphasis added).

[3] Section 163-226.3(a)(5) states, in full: "Any person who shall, in connection with absentee voting in any election held in this State, do any of the acts or things declared in this section to be unlawful, shall be guilty of a Class I felony. It shall be unlawful: . . . (5) For any person to take into that person's possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter, provided, however, that this prohibition shall not apply to a voter's near relative or the voter's verifiable legal guardian." N.C. Gen. Stat. § 163-226.3(a)(5) (emphasis added).

the NCSBOE's proposal to eliminate the witness requirement for absentee ballots and to instead adopt a signature-matching software. The General Assembly was also aware of potential delivery issues concerning mail-in absentee ballots. Additionally, two recent voting experiences informed the General Assembly's choices. First, the General Assembly had information concerning voting processes in primary elections conducted during a pandemic. Second, the General Assembly was painfully aware of the massive abstentee-ballot fraud that occurred in the 2018 election for North Carolina's Ninth Congressional District. The scope and extent of the absentee-ballot fraud in that election required North Carolina to invalidate the election results and conduct a new election.

On June 12, 2020, Governor Cooper signed the Bipartisan Elections Act into law. As relevant here, the Bipartisan Elections Act changed the witness requirements for absentee ballots. Specifically, the act provides:

> For an election held in 2020, notwithstanding G.S. 163-229(b) and G.S. 163-231(a), and provided all other requirements for absentee ballots are met, a voter's returned absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of at least one person who is at least 18 years of age and is not disqualified by G.S. 163-226.3(a)(4) or G.S. 163-237(c), provided that the person signed the application and certificate as a witness and printed that person's name and address on the container-return envelope.

N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added). The Bipartisan Elections Act did not change the requirements concerning who may return an absentee ballot in section 163-231 or the criminal prohibition concerning the same in section 163-226.3(a)(5). It also did not change several provisions relevant to this lawsuit. Specifically, the Bipartisan Elections Act did not change the provision that sets the a deadline for receipt of absentee ballots: "The ballots issued under this Article are postmarked and that postmark is dated on or before the day of the statewide primary or general election or county bond election and are received by the county board of elections not later than three days after the election by 5:00 p.m." N.C. Gen. Stat. § 163-231(b)(2)(b) (emphasis added).

After the General Assembly enacted and the Governor signed the Bipartisan Elections Act, litigation ensued in the United States District Court for the Middle District of North Carolina in which plaintiffs in that case challenged numerous provisions of the Bipartisan Elections Act and North Carolina election laws. On August 4, 2020, after holding extensive hearings, the Honorable William L. Osteen, Jr., issued a comprehensive 188-page order largely upholding various North Carolina election laws applicable in this election (including the witness requirement), but requiring a procedural due process remedy to provide a "voter with notice and opportunity to be heard before a delivered absentee ballot is disallowed or rejected." See Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-CV-457, — F. Supp. 3d —, 2020 WL 4484063, at *62 (M.D.N.C. Aug. 4, 2020) [hereinafter Democracy N.C.]. On September 3, 2020, a three-judge panel on the Wake County Superior Court denied injunctive relief to plaintiffs in that case seeking, inter alia, to enjoin enforcement of the witness requirement for casting absentee ballots under N.C. Gen. Stat. § 163-231 and N.C. Sess. Laws 2020-17. See Chambers v. North Carolina, 20CVS500124 (N.C. Sup. Ct. Sept. 3, 2020) (three-judge court).

On August 10, 2020, the North Carolina Alliance for Retired Americans and seven individual North Carolina voters (the "Alliance plaintiffs") filed suit in Wake County Superior Court against the NCSBOE and Circosta seeking declaratory and injunctive relief concerning several North Carolina election statutes. On the same date, the Alliance plaintiffs moved for a preliminary injunction. See [D.E. 1-2] 3. Berger and Moore intervened in the Alliance plaintiffs' suit in their respective official capacities. On August 18, 2020, the Alliance plaintiffs amended their complaint. See [D.E. 1-10]. The Alliance plaintiffs asked the court to "[s]uspend the Witness Requirement for single-person or single-adult households" and "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up

to nine days after Election Day." See id. at 5. Under the North Carolina General Statutes, an absentee ballot is timely if "postmarked and that postmark is dated on or before the day of the statewide primary or general election or county bond election and are received by the county board of elections not later than three days after the election by 5:00 p.m." N.C. Gen. Stat. § 163-231(b)(2)(b). The Alliance plaintiffs also asked the court to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot under section 163-226.3(a)(5). See [D.E. 1-9] 42.

On August 21, 2020, the NCSBOE issued Numbered Memo 2020-19 (the "August 2020-19 memo"). See [D.E. 1-4]. In that memo, the NCSBOE confirmed the statutory deadlines for absentee ballots. See id. at 5, ¶ 4. The NCSBOE also stated that a voter may cure two absentee ballot defects with a voter affidavit: (1) "Voter did not sign the Voter Certification"; and (2) "Voter signed in the wrong place." Id. at 3, ¶ 2.1. Additionally, the NCSBOE stated that five absentee ballot defects (four concerning the witness requirement) cannot be cured by a voter affidavit "because the information comes from someone other than the voter." Id. These defects include: (1) "Witness or assistant did not print name"; (2) "Witness or assistant did not print address"; (3) "Witness or assistant did not sign"; (4) "Witness or assistant signed on the wrong line"; (5) "Upon arrival at the county board office, the envelope is unsealed or appears to have been opened and resealed." Id. at 3, ¶ 2.2. If a voter's absentee ballot contains one or more of these five defects, the county board spoils the voter's absentee ballot and reissues a ballot, sending the reissued ballot and notice to the voter. Id. The August 2020-19 memo also has a procedural due process cure provision. See id. at 3–4, ¶¶ 3–5. Additionally, the August 2020-19 memo confirmed that "because of the requirements about who can deliver a ballot, and because of the logging requirements, an absentee ballot may not be left in an unmanned drop box." Id. at 6, ¶ 6.2.

On August 21, 2020, when the NCSBOE issued the August 2020-19 memo, the state court had not issued an order resolving the Alliance plaintiffs' request for injunctive relief. On September 4, 2020, the election began when the NCSBOE began issuing absentee ballots to voters.

On September 22, 2020, the NCSBOE and the Alliance plaintiffs submitted to the state court a proposed consent judgment with three exhibits. See [D.E. 1-2]. The exhibits contain three memoranda from Bell that detail material changes to the on-going election and deviate from the statutory scheme. The last two exhibits became operative upon the state court's approval of the consent judgment on October 2, 2020. The three memoranda are Numbered Memo 2020-19 (the "September 2020-19 memo"; i.e., the revised version of the August 2020-19 memo issued on August 21, 2020 and revised on September 22, 2020), Numbered Memo 2020-22, and Numbered Memo 2020-23 (collectively, the "memoranda").

The September 2020-19 memo "directs the procedure county boards must use to address deficiencies in absentee ballots." Specifically, if a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the NCSBOE considers that error a "deficiency" and would allow the absentee voter to "cure". [D.E. 1-2] 33. A voter cures such a deficiency through a "certification," which is a form the county board of elections sends to a voter that requires the voter to sign and affirm the following:

> I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I requested, voted, and returned an absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

[D.E. 1-2] 37. Notwithstanding Judge Osteen's order of August 4, 2020, this change eliminates the

statutory witness requirement for such a voter.[4]

Numbered Memo 2020-22 states that a ballot is timely "if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m." Id. at 29 (emphasis added). Additionally, Numbered Memo 2020-22 states: "For remaining elections in 2020, a ballot shall be considered postmarked by Election Day if it has a postmark affixed to it or if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." Id. at 30. This numbered memo changes the statutory deadline for absentee ballots.

Numbered Memo 2020-23 concerns "In-Person Return of Absentee Ballots." Id. at 39. In relevant part, it states: "Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot. . . . **Because of this provision in the law, an absentee ballot may not be left in an unmanned drop box.** . . . The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it." Id. at 39 (emphasis in original). Two pages later, Numbered Memo 2020-23 states: "Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot. . . . If your site has a mail drop or drop box used for other purposes, you must affix a sign stating that voters may not place their ballots in the drop box. However, a county board may not disapprove

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[4] At the October 2, 2020 hearing in this court, NCSBOE's counsel confirmed this understanding of the September 2020-19 memo cure provisions. When the court asked NCSBOE's counsel whether the September 2020-19 memo's voter certification cure applied to an absentee ballot on which all witness information was missing, NCSBOE's counsel responded that it did.

a ballot solely because it is placed in a drop box." Id. at 40–41 (emphasis added). This numbered memo eliminates the requirement that only the voter, the voter's near relative, or the voter's verifiable guardian may deliver the absentee ballot.

As mentioned, on September 4, 2020, the election began in North Carolina when the NCSBOE began mailing absentee ballots to voters. The first date on which NCSBOE reports absentee ballots cast is September 4, 2020. As of September 22, 2020, at 4:40 a.m., North Carolina voters had cast 153,664 absentee ballots. As of October 2, 2020, at 4:40 a.m., North Carolina voters had cast 319,209 ballots. See North Carolina State Board of Elections, N.C. Absentee Statistics for the 2020 General Election, https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/Absentee_Stats_2020General_10022020.pdf (last visited Oct. 2, 2020). The plaintiff voters in this case (Heath and Whitley) and one plaintiff voter in Wise (Patsy J. Wise) cast their absentee ballots and had them accepted before the Alliance plaintiffs filed notice of the consent judgment in the state court lawsuit on September 22, 2020.

On September 28, 2020, this court held a status conference in this case. At the status conference, NCSBOE's counsel stated that the NCSBOE issued the September 2020-19 memo (dated September 22, 2020) "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." This court asked NCSBOE's counsel whether NCSBOE had submitted the September 2020-19 memo to Judge Osteen and explained to Judge Osteen why the NCSBOE issued it. NCSBOE's counsel replied that the NCSBOE had not submitted the September 2020-19 memo to Judge Osteen, but that it was on counsel's list "to get done today." On September 28, 2020, the NCSBOE filed the September 2020-19 memo with the Middle District of North Carolina.

On September 30, 2020, Judge Osteen issued an order stating that the September 2020-19 memo is not "consistent with [his] order entered on August 4, 2020." See Order, Democracy N.C., No. 1:20-CV-457 [D.E. 145] 3 (M.D.N.C. Sept. 30, 2020). Judge Osteen scheduled a hearing for October 7, 2020, at 12:00 p.m. Id. [D.E. 149]. On September 30, 2020, plaintiffs in Democracy N.C. filed a motion and memorandum in the Middle District seeking to enforce order granting in part preliminary injunction, or in the alternative, motion for clarification, and to expedite. See Democracy N.C., No. 1:20-CV-457 [D.E. 147, 148] (M.D.N.C. Sept. 30, 2020). On October 1, 2020, the NCSBOE issued Numbered Memo 2020-27 discussing Judge Osteen's order of September 30, 2020. See [D.E. 40-2]. Numbered Memo 2020-27 states that, "to avoid confusion while related matters are pending in a number of courts, . . . [c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope." Id. at 2. Numbered Memo 2020-27 also states that "[i]n all other respects, Numbered Memo 2020-19, as revised on September 22, 2020 [i.e., the September 2020-19 memo], remains in effect." Id.

On October 1, 2020, Judge Osteen asked for expedited briefing on whether, inter alia, "the court should consider restraining Defendant North Carolina State Board of Elections' actions taken pursuant to Memo 2020-19 (Doc. 143-1), in light of the earlier version of that memorandum issued on August 21, 2020," and established a deadline of 12:00 p.m. on October 2, 2020, for such briefing. See Democracy N.C., No. 1:20-CV-457 [D.E.149] (M.D.N.C. Oct. 1, 2020). On October 2, 2020, Legislative defendants in Democracy N.C. asked Judge Osteen to enjoin the September 2020-19 memo and to permit the August 2020-19 memo (dated August 21, 2020) to be operative. See id. [D.E. 150].

On October 2, 2020, at 5:00 p.m., this court held a hearing on the pending TRO motions in this case and Wise. At that hearing, NCSBOE's counsel stated that the state court judge in Alliance

had approved the consent judgment in that case. See [D.E. 45-1] (attaching a copy of the consent judgment, which was approved at 4:08 p.m.). NCSBOE's counsel referenced the notice filed with this court shortly before the hearing notifying the court that the state court entered a consent judgment in Alliance. See [D.E. 45]. NCSBOE's counsel stated that the consent judgment attached to the notice at docket entry 45 was a true and accurate copy of the consent judgment the state court judge entered, and that the attached consent judgment was identical to the proposed consent judgment plaintiffs submitted with their complaint in this case. Cf. [D.E. 1-2].

During the hearing on October 2, 2020, the court learned that Judge Osteen filed an extensive order requesting additional briefing on certain constitutional questions, the need for additional injunctive relief, how Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), might apply, and the definition of "material error subject to remediation." See Democracy N.C., [D.E. 152] 1–8. Motions for injunctive relief in Democracy N.C. are due October 5, 2020, by 5:00 p.m. Responses in Democracy N.C. are due by 4:00 p.m. on October 6, 2020. Judge Osteen will hold oral argument on October 7, 2020, at 2:00 p.m. After the hearing, the court took plaintiffs' motions for a temporary restraining order in this case and in Wise under advisement. Numerous intervention motions are pending in this case and Wise, including from the plaintiffs in the Democracy N.C. action and the state-court action.

II.

The court has considered plaintiffs' request for a temporary restraining order under the governing standard. See, e.g., Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 188 (4th Cir. 2013) (en banc); Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds, 559 U.S. 1089 (2010), reissued in relevant part, 607 F.3d 355 (4th Cir. 2010) (per curiam); U.S. Dep't of Labor v.

Wolf Run Mining Co., 452 F.3d 275, 281 n.1 (4th Cir. 2006) (substantive standard for temporary restraining order is same as that for entering a preliminary injunction).

For purposes of this order only, the court need not address plaintiffs' claim in this case under the Elections Clause, or the Wise plaintiffs claims under the Elections Clause or Article II, § 1. Moreover, the court has considered the parties' arguments in this case and in Wise made both in the papers and at the hearings. The court finds plaintiffs' arguments concerning the Equal Protection Clause persuasive. In short, the court grants plaintiffs' motion in this case and in Wise for a temporary restraining order based on the Equal Protection Clause for the reasons stated in plaintiffs' papers and at the October 2, 2020 hearing. Plaintiff voters in this case and in Wise have established that (1) they are likely to succeed on the merits of their claims that the provisions in the memoranda violate the plaintiff voters' rights under the Equal Protection Clause; (2) they are likely to suffer irreparable harm absent a temporary restraining order; (3) the balance of the equities tips in their favor; and (4) a temporary restraining order is in the public interest.

Under the Fourteenth Amendment of the Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of many provisions of the Constitution that "protects the right of all qualified citizens to vote, in state as well as federal elections." Reynolds v. Sims, 377 U.S. 533, 554 (1964); see Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam). "The right to vote is more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." Bush, 531 U.S. at 104; see Wright v. North Carolina, 787 F.3d 256, 259, 263–64 (4th Cir. 2015); Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 234 (6th Cir. 2011).

The Supreme Court has identified two, separate frameworks for analyzing challenges to state voting laws and policies under the Fourteenth Amendment: (1) the framework identified in

Reynolds and Bush (hereinafter the "Reynolds-Bush" framework); and (2) the framework identified in Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992) (hereinafter the "Anderson-Burdick" framework). See Marcellus v. Va. State Bd. of Elections, 849 F.3d 169, 180 n.2 (4th Cir. 2017); Libertarian Party of Va. v. Alcorn, 826 F.3d 708, 716–17 (4th Cir. 2016); Wright, 787 F.3d at 263–64.

The Reynolds-Bush framework addresses two principle harms under the Fourteenth Amendment. The first of those two harms is "a debasement or dilution of the weight of a citizen's vote." Reynolds, 377 U.S. at 555; see id. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."); see also Bush, 531 U.S. at 105 ("It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (quotation omitted)); Baker v. Carr, 369 U.S. 186, 207–08 (1962); Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections, 827 F.3d 333, 337–38 (4th Cir. 2016); Wright, 787 F.3d at 259, 263–64; cf. Anderson v. United States, 417 U.S. 211, 226–27 (1974); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Not only can [the right to vote] not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots or diluted by stuffing of the ballot box."); id. at 8 ("We hold that, construed in its historical context, the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (footnotes omitted)).

The second harm that the Fourteenth Amendment prohibits and that is addressed under the Reynolds-Bush framework is the "arbitrary or disparate treatment of members of [the state's] electorate." Bush, 531 U.S. at 105; see id. at 104–05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote

over that of another."); Dunn v. Blumenstein, 405 U.S. 330, 336 (1972); Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 56 (1970) ("We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . ."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); Gray v. Sanders, 372 U.S. 368, 380 (1963). To that end, a state must have "specific rules designed to ensure uniform treatment" of a voter's ballot. Bush, 531 U.S. at 106; see Dunn, 405 U.S. at 336 ("[A] citizen has a constitutionally protected right to participate in the elections on an equal basis with other citizens in the jurisdiction."); Gray, 372 U.S. at 380 ("[T]he Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

Plaintiff voters' claims under the Equal Protection Clause raise profound questions concerning arbitrariness and vote dilution. The election in North Carolina began on September 4, 2020. On that date, the August 2020-19 memo was legally operative and consistent with Judge Osteen's comprehensive order of August 4, 2020. The August 2020-19 memo included the statutory witness requirement, the statutory absentee ballot deadline, the statutory requirement concerning who could deliver absentee ballots, and a procedural due process cure for absentee voters.

By September 22, 2020, over 150,000 North Carolina voters—including plaintiffs Heath and Whitley in this case, and plaintiff Wise in Wise—had cast absentee ballots under the statutory scheme and the August 2020-19 memo. On October 2, 2020, however, after the election started and 319,209 North Carolina voters had cast absentee ballots, the NCSBOE materially changed the rules under which the election was taking place. Specifically, the September 2020-19 memo, Numbered

Memo 2020-22, and Numbered Memo 2020-23 eliminate the statutory witness requirement, change the statutory dates and method by which absentee ballots are accepted, and change the statutory scheme as to who can deliver absentee ballots. At bottom, the NCSBOE has ignored the statutory scheme and arbitrarily created multiple, disparate regimes under which North Carolina voters cast absentee ballots, and plaintiff voters in this case and in Wise are likely to succeed on their claims under the Equal Protection Clause.

The NCSBOE inequitably and materially upset the electoral status quo in the middle of an election by issuing the memoranda and giving the memoranda legal effect via the October 2, 2020 consent judgment. The court issues this temporary restraining order to maintain the status quo. Cf. Purcell, 549 U.S. at 4–6. Additionally, the constitutional harm of which plaintiff voters complain would be irreparable absent a temporary restraining order in this case and Wise. The public has a distinct interest in ensuring that plaintiffs' voting rights under the Constitution are secure. See Giovanni Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002); see also Legend Night Club v. Miller, 637 F.3d 291, 302–03 (4th Cir. 2011) ("Maryland is in no way harmed by issuance of an injunction that prevents the state from" violating the Constitution). "[P]ublic confidence in the integrity of the electoral process" is of paramount importance. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008). The memoranda, by materially changing the electoral process in the middle of an election after over 300,000 people have voted, undermines that confidence and creates confusion for those North Carolinians who have yet to cast their absentee ballots. In contrast, the relief plaintiff voters seek temporarily restores the status quo for absentee voting in North Carolina until the court can assess this case and the Wise case on a fuller record.

In opposition, defendants in this case raise various procedural arguments to plaintiffs' motion for a temporary restraining order. See [D.E. 31]. The court rejects those arguments at this early

stage in the litigation for the reasons stated in plaintiffs' comprehensive reply brief and at oral argument. See [D.E. 40-1].

Plaintiff voters in this case and in Wise have established that the Winter factors warrant a temporary restraining order in their favor. Thus, the court grants a temporary restraining order in this case and in Wise.

III.

As for defendants' previous motion to transfer venue in this case [D.E. 14], the court entered an order denying the motion on September 30, 2020 [D.E. 26]. Upon reconsideration of the record in this case, Wise, and Democracy N.C., the court finds that transferring this action and the Wise action to the Honorable William L. Osteen, Jr., pursuant to the first-filed rule better comports with Fourth Circuit precedent and the interests of justice.[5]

The Fourth Circuit recognizes the "first-filed" rule. See, e.g., Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co., 736 F.3d 255, 258 & n.1 (4th Cir. 2013); Ellicott Mach. Corp. v. Modern Welding Co., 502 F.2d 178, 180–82 (4th Cir. 1974); Golden Corral Franchising Sys., Inc. v. GC of Vineland, LLC, No. 5:19-CV-255-BO, 2020 WL 1312863, at *2 (E.D.N.C. Mar. 17, 2020) (unpublished); Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357, 360 (W.D.N.C. 2003). According to the first-filed rule, a district court has an independent, equitable basis for transferring an action where "sound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money" in separate litigation. Blue Stuff, 264 F. Supp. 2d at 360 (quoting Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 626 (D.C. Cir.

[5] Although this court cited In re Bozic, 888 F.3d 1048, 1054 (9th Cir. 2018), in its order denying defendants' motion to transfer, [D.E. 26], that case is not controlling precedent in the Fourth Circuit. Moreover, numerous developments in this case, Wise, and Democracy N.C. during the last six days demonstrate the wisdom of the Fourth Circuit's first-filed rule.

1975)); see Hartford Fire, 736 F.3d at 258 n.1 ("[W]e note that [a] court [is] free to raise the issue of the first-to-file rule sua sponte."). The "first-filed" rule provides that where parties "have filed similar litigation in separate federal fora, doctrines of federal comity dictate that the matter should proceed in the court where the action was first filed, and that the later-filed action should be stayed, transferred, or enjoined." Blue Stuff, 264 F. Supp. 2d at 360.

Courts have recognized three factors to consider "in determining whether to apply the first-filed rule: 1) the chronology of the filings, 2) the similarity of the parties involved, and 3) the similarity of the issues at stake." Id. "[T]he parties need not be perfectly identical in order for the first-filed rule to apply." Golden Corral, 2020 WL 1312862, at * 2; see Troce v. Bimbo Foods Bakeries Distrib., Inc., No. 3:11CV234-RJC-DSC, 2011 WL 3565054, at *3 (W.D.N.C. Aug. 12, 2011) (unpublished). Issues in separate cases are similar when they "bear on a common question." Berger v. United States DOJ, Nos. 5:16-CV-240-FL, 5:16-CV-245-FL, 2016 U.S. Dist. LEXIS 84536, at *32 (E.D.N.C. June 29, 2016) (unpublished).

Notwithstanding plaintiffs' initial choice of forum, the "first-filed" rule counsels in favor of transferring this case and the Wise case to Judge Osteen in the Middle District of North Carolina. Judge Osteen is currently presiding over Democracy N.C. That case was filed over four months before proceedings commenced in these actions. Additionally, the parties in all three cases are similar. Plaintiffs Moore and Berger are parties to this action and the Democracy N.C. action and are seeking injunctive relief in each action.[6] And defendants Circosta, Anderson, Carmon, and Bell

[6] Although plaintiffs in the Wise case are not parties to this action or Democracy N.C., this incongruity is outweighed by the fact that at least one plaintiff in Wise, Samuel Grayson Baum, resides in the Middle District of North Carolina and, with the consent of defendants, could have brought his action in that court in the first instance. See 28 U.S.C. § 1404(a); Wise, No. 5:20-CV-505 [D.E. 1].

are defendants in all three cases.[7] Furthermore, this case, Wise, and Democracy N.C. present substantially similar issues that "bear on a common question," i.e., defendants' initial conduct in setting the rules for North Carolina's 2020 election in accordance with Judge Osteen's order and the statutory scheme, and their conduct in changing those rules while subject to Judge Osteen's order. Notably, in Democracy N.C., Judge Osteen upheld the witness requirement and various other election requirements. Defendants issued the August 2020-19 memo in response to Judge Osteen's order, and the election began under the statutory scheme and the August 2020-19 memo. The September 2020-19 memo, however, eliminated the witness requirement. Moreover, Judge Osteen was not aware of the September 2020-19 memo until NCSBOE's counsel filed it in Democracy N.C. on Monday, September 28, 2020, after prompting from this court. The orders Judge Osteen issued following NCSBOE counsel's filing of the September 2020-19 memo illuminated the commonality of issues in Democracy N.C., Wise, and this action. Furthermore, there are no "special circumstances," such as forum shopping or bad faith filings, that cut against transferring this action under the first-filed rule. Blue Stuff, 264 F. Supp. 2d at 360.

Equitable factors also counsel transferring this action to Judge Osteen. Judge Osteen has been presiding over the Democracy N.C. action, involving similar parties and an overarching similar issue, for over four months. He conducted a two-day evidentiary hearing and issued a 188-page order granting in part the plaintiffs' motion for a preliminary injunction, largely upholding the statutory scheme for this election (including the witness requirement). See Democracy N.C., 2020 WL 4484063, at *1. As of October 2, 2020, Judge Osteen issued an expedited briefing order in that

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[7] Although plaintiffs Heath, Whitley, and Swain in this action and voter plaintiffs in Wise are not parties to Democracy N.C., transferring a case under the first-filed rule does not require that the parties be "perfectly identical." Golden Corral, 2020 WL 1312862, at * 2; see Troce, 2011 WL 3565054, at *3.

case and ordered any party "requesting affirmative relief," including "injunctive relief," to "file a motion setting out the basis for that relief[]" no later than 5:00 p.m. on October 5, 2020. See Democracy N.C., [D.E. 152] 8–9. Allowing Judge Osteen to consider these actions together (even if not consolidated) constitutes "sound judicial administration" and avoids "wasteful expenditure of energy" and confusion as contemplated by the first-filed rule. See Blue Stuff, 264 F. Supp. 2d at 360. It also allows expeditious resolution of requests for injunctive relief and avoids multiple federal courts imposing potentially conflicting preliminary or permanent injunctions concerning this election. Accordingly, this court transfers this action and the Wise action to Judge Osteen in the Middle District of North Carolina.

IV.

In sum, the court GRANTS plaintiffs' emergency motion for a temporary restraining order in this case [D.E. 8] and in Wise [D.E. 3]. Defendants are TEMPORARILY ENJOINED from enforcing the September 2020-19 memo, Numbered Memo 2020-22, Numbered Memo 2020-23, or any similar memoranda or policy statement that does not comply with the requirements of the Equal Protection Clause. This order does not enjoin or affect the August 2020-19 memo. This temporary restraining order shall be in effect until no later than October 16, 2020, and is intended to maintain the status quo. See Fed. R. Civ. P. 65(b)(2). No bond is required. Cf. Fed. R. Civ. P. 65(c).

The court also TRANSFERS this action and Wise v. North Carolina State Board of Elections, No. 5:20-CV-505 (E.D.N.C.), to the Honorable William L. Osteen, Jr., United States District Judge in the Middle District of North Carolina for consideration along with Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20-CV-457 (M.D.N.C.). Judge Osteen has authority to terminate or modify this temporary restraining order, and this court is confident that Judge Osteen will schedule promptly, as needed, any preliminary injunction hearing or any hearing concerning

injunctive relief in this case, the Wise case, and the Democracy N.C. case. Having one federal judge preside over these three actions expedites final resolution of the dispute in this case, Wise, and Democracy N.C., helps to minimize voter confusion in this election, and helps to ensure that defendants are not subject to conflicting federal court orders in this election.

SO ORDERED. This 3 day of October 2020.

JAMES C. DEVER III
United States District Judge

U.S. Constitution

U.S. Constitution Article I, § 4, clause 1

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Constitution Article II, § 1, clause 2

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

U.S. Constitution amend. XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

DATE: August 21, 2020 (revised on September 22, 2020)

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.[1]

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

[1] This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name[2]
- Witness or assistant did not print address[3]
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line

[2] If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

[3] Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure certification in accordance with Section 3.

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

If, prior to September 22, 2020, a county board reissued a ballot to a voter, and the updated memo now allows the deficiency to be cured by certification, the county board shall contact the voter in writing and by phone or email, if available, to explain that the procedure has changed and that the voter now has the option to submit a cure certification instead of a new ballot. A county board is not required to send a cure certification to a voter who already returned their second ballot if the second ballot is not deficient.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline, defined in Numbered Memo 2020-22 as (1) 5 p.m. on Election Day or (2) if postmarked on or before Election Day, 5 p.m. on Thursday, November 12, 2020. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.

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Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

DATE: August 21, 2020 (revised on September 22, 2020; further revised on October 17, 2020 in light of orders in *Democracy NC v. North Carolina State Bd. of Elections*, No. 20-cv-457 (M.D.N.C.) and *NC Alliance for Retired Americans v. North Carolina State Bd. of Elections*, No. 20-CVS-8881 (Wake Cty. Sup. Ct.))

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.[1]

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature

[1] This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name[2]
- Witness or assistant did not print address[3]

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[2] If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

[3] Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure

- Witness or assistant signed on the wrong line

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Witness or assistant did not sign
- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county

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certification in accordance with Section 3. See Numbered Memo 2020-29 for additional information regarding address issues.

board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by the deadline for receipt of absentee ballots. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline by (1) 5 p.m. on Election Day or (2), if postmarked on or before Election Day and received by mail by the deadline for receipt of postmarked ballots. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.

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Numbered Memo 2020-22

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Return Deadline for Mailed Civilian Absentee Ballots in 2020

DATE: September 22, 2020

The purpose of this numbered memo is to extend the return deadline for postmarked civilian absentee ballots that are returned by mail and to define the term "postmark." This numbered memo only applies to remaining elections in 2020.

Extension of Deadline

Due to current delays with mail sent with the U.S. Postal Service (USPS)—delays which may be exacerbated by the large number of absentee ballots being requested this election—the deadline for receipt of postmarked civilian absentee ballots is hereby extended to nine days after the election only for remaining elections in 2020.

An absentee ballot shall be counted as timely if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m.[1]

Postmark Requirement

The postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, the USPS does not always affix a postmark to a ballot return envelope. Because the agency now offers BallotTrax, a service that allows voters and county boards to track the status of a voter's absentee ballot, it is possible for county boards to determine when a ballot was mailed even if it does not have a postmark. Further, commercial carriers including DHL, FedEx, and UPS offer tracking services that allow voters and the county boards of elections to determine when a ballot was deposited with the commercial carrier for delivery.

[1] *Compare* G.S. § 163-231(b)(2)(b) (that a postmarked absentee ballot be received by three days after the election).

For remaining elections in 2020, a ballot shall be considered postmarked by Election Day if it has a postmark affixed to it or if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day. If a container-return envelope arrives after Election Day and does not have a postmark, county board staff shall conduct research to determine whether there is information in BallotTrax that indicates the date it was in the custody of the USPS. If the container-return envelope arrives in an outer mailing envelope with a tracking number after Election Day, county board staff shall conduct research with the USPS or commercial carrier to determine the date it was in the custody of USPS or the commercial carrier.

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Numbered Memo 2020-23

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: In-Person Return of Absentee Ballots

DATE: September 22, 2020

Absentee by mail voters may choose to return their ballot by mail or in person. Voters who return their ballot in person may return it to the county board of elections office by 5 p.m. on Election Day or to any one-stop early voting site in the county during the one-stop early voting period. This numbered memo provides guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots.

General Information

Who May Return a Ballot

A significant portion of voters are choosing to return their absentee ballots in person for this election. Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot.[1] A multipartisan assistance team (MAT) or a third party may not take possession of an absentee ballot. **Because of this provision in the law, an absentee ballot may not be left in an unmanned drop box.**

The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it.

Intake of Container-Return Envelope

As outlined in Numbered Memo 2020-19, trained county board staff review each container-return envelope to determine if there are any deficiencies. Review of the container-return envelope

[1] It is a class I felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. G.S. § 163-223.6(a)(5).

does not occur at intake. Therefore, the staff member conducting intake should not conduct a review of the container envelope and should accept the ballot. If intake staff receive questions about whether the ballot is acceptable, they shall inform the voter that it will be reviewed at a later time and the voter will be contacted if there are any issues. Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot.

It is not recommended that county board staff serve as a witness for a voter while on duty. If a county board determines that it will allow staff to serve as a witness, the staff member who is a witness shall be one who is not involved in the review of absentee ballot envelopes.

Log Requirement

An administrative rule requires county boards to keep a written log when any person returns an absentee ballot in person.[2] **However, to limit the spread of COVID-19, the written log requirement has been adjusted for remaining elections in 2020.**

When a person returns the ballot in person, the intake staff will ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person indicates they are not the voter or the voter's near relative or legal guardian, the staffer will also require the person to provide their address and phone number.

Board Consideration of Delivery and Log Requirements

Failure to comply with the logging requirement, or delivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot.[3] A county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized

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[2] 08 NCAC 18 .0102 requires that, upon delivery, the person delivering the ballot shall provide the following information in writing: (1) Name of voter; (2) Name of person delivering ballot; (3) Relationship to voter; (4) Phone number (if available) and current address of person delivering ballot; (5) Date and time of delivery of ballot; and (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative.

[3] *Id.* Compare G.S. § 163-230.2(3), as amended by Section 1.3.(a) of Session Law 2019-239, which states that an absentee request form returned to the county board by someone other than an unauthorized person is invalid.

to possess the ballot. The county board may, however, consider the delivery of a ballot in accordance with the rule, 08 NCAC 18 .0102, in conjunction with other evidence in determining whether the ballot is valid and should be counted.

Return at a County Board Office

A voter may return their absentee ballot to the county board of elections office any time the office is open. A county board must ensure its office is staffed during regular business hours to allow for return of absentee ballots. Even if your office is closed to the public, you must provide staff who are in the office during regular business hours to accept absentee ballots until the end of Election Day. You are not required to accept absentee ballots outside of regular business hours. Similar to procedures at the close of polls on Election Day, if an individual is in line at the time your office closes or at the absentee ballot return deadline (5 p.m. on Election Day), a county board shall accept receipt of the ballot.

If your site has a mail drop or drop box used for other purposes, you must affix a sign stating that voters may not place their ballots in the drop box. However, a county board may not disapprove a ballot solely because it is placed in a drop box.[4]

In determining the setup of your office for in-person return of absentee ballots, you should consider and plan for the following:

- Ensure adequate parking, especially if your county board office will be used as a one-stop site
- Arrange sufficient space for long lines and markings for social distancing
- Provide signage directing voters to the location to return their absentee ballot
- Ensure the security of absentee ballots. Use a locked or securable container for returned absentee ballots that cannot be readily removed by an unauthorized person.
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, it is not recommended you keep an outside return location open after dark or during inclement weather.

[4] *Id.*

Return at an Early Voting Site

Location to Return Absentee Ballots

Each early voting site shall have at least one designated, staffed station for the return of absentee ballots. Return of absentee ballots shall occur at that station. The station may be set up exclusively for absentee ballot returns or may provide other services, such as a help desk, provided the absentee ballots can be accounted for and secured separately from other ballots or processes. Similar to accepting absentee ballots at the county board of elections office, you should consider and plan for the following with the setup of an early voting location for in-person return of absentee ballots:

- Have a plan for how crowd control will occur and how voters will be directed to the appropriate location for in-person return of absentee ballots
- Provide signage directing voters and markings for social distancing
- Ensure adequate parking and sufficient space for long lines
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, ensure that there is adequate lighting as voting hours will continue past dark.

Because absentee ballots must be returned to a designated station, absentee ballots should not be returned in the curbside area.

Procedures

Absentee ballots that are hand-delivered must be placed in a secured container upon receipt, similar to how provisional ballots are securely stored at voting sites. Absentee by mail ballots delivered to an early voting site must be stored separately from all other ballots in a container designated only for absentee by mail ballots. County boards must also conduct regular reconciliation practices between the log and the absentee ballots. County boards are not required by the State to log returned ballots into SOSA; however, a county board may require their one-stop staff to complete SOSA logging.

If a voter brings in an absentee ballot and does not want to vote it, the ballot should be placed in the spoiled-ballot bag. It is recommended that voters who call the county board office and do not want to vote their absentee ballot be encouraged to discard the ballot at home.

Return at an Election Site

An absentee ballot may not be returned at an Election Day polling place. If a voter appears in person with their ballot at a polling place on Election Day, they shall be instructed that they may

(1) take their ballot to the county board office or mail it so it is postmarked that day and received by the deadline; or (2) have the absentee ballot spoiled and vote in-person at their polling place.

If someone other than the voter appears with the ballot, they shall be instructed to take it to the county board office or mail the ballot so it is postmarked the same day. If the person returning the ballot chooses to mail the ballot, they should be encouraged to take it to a post office to ensure the envelope is postmarked. Depositing the ballot in a USPS drop box on Election Day may result in ballot not being postmarked by Election Day and therefore not being counted.

NORTH CAROLINA
STATE BOARD OF ELECTIONS

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Numbered Memo 2020-28

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Court Orders Regarding Numbered Memos

DATE: October 4, 2020

To avoid confusion while related matters are pending in a number of courts, this memo is issued effective immediately and is in place until further numbered memo(s) is issued by the State Board.

For the reasons set forth in this memo, Numbered Memos 2020-19 (both versions), 2020-22, 2020-23 and 2020-27 are on hold until further notice from the State Board. On October 2, 2020, the Wake County Superior Court in *NC Alliance v. State Board* entered a consent judgment ordering that, to settle all of plaintiffs' claims, Numbered Memo 2020-19 (Absentee Container-Return Envelope Deficiencies), Numbered Memo 2020-22 (Return Deadline for Mailed Civilian Absentee Ballots in 2020), and Numbered Memo 2020-23 (In-Person Return of Absentee Ballots) shall be issued.

However, on October 3, 2020, the U.S. District Court for the Eastern District of North Carolina temporarily blocked the State Board from enforcing the same numbered memos. The court also transferred the cases to the U.S. District Court for the Middle District of North Carolina that has jurisdiction over the *Democracy NC* case. *Moore v. Circosta*, 5:20-CV-507-D, (E.D.N.C. Oct. 3, 2020); *Wise v. State Board*, 5:20-CV-507-D, (E.D.N.C. Oct. 3, 2020). The State Board's attorneys are reviewing these competing orders and will provide guidance as soon as possible on how to move forward.

At this time, because of these conflicting orders, Numbered Memos 2020-19, 2020-22, 2020-23 and 2020-27 are on hold.

County boards that receive an executed absentee container-return envelope with a deficiency shall take no action as to that envelope. County boards shall not send a cure certification or reissue the ballot if they receive an executed container-return envelope with any deficiency. County boards also may not accept or reject any ballots if the container-return envelope has any

deficiencies. Envelopes with deficiencies shall be kept in a secure location and shall not be considered by the county board until further notice. Once the State Board receives further direction from a court, we will issue guidance to county boards on what actions they should take regarding container-return envelopes with deficiencies. If a county board has previously reissued a ballot, and the second envelope is returned without any deficiencies, the county board may approve the second ballot.

County boards that receive deficient envelopes shall not check them into SEIMS. We recommend that, if a voter calls your office and wants to know about the status of their deficient ballot, your staff state: "We have received your ballot and there is an issue. *Currently the cure process is being considered by the courts.* We will contact you soon with more information." If the ballot has a deficiency, do not issue a cure certification or spoil the ballot even upon a voter's request.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

PATSY J. WISE, REGIS CLIFFORD, CAMILLE ANNETTE BAMBINI, SAMUEL GRAYSON BAUM, DONALD J. TRUMP FOR PRESIDENT INC., U.S. CONGRESSMAN DANIEL BISHOP, U.S. CONGRESSMAN GREGORY F. MURPHY, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and NORTH CAROLINA REPUBLICAN PARTY, *Plaintiffs, vs.* THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS, *Defendants.*	Civil Action No. 5:20-cv-505

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Patsy J. Wise, Regis Clifford, Camille Annette Bambini, Samuel Grayson Baum, the Donald J. Trump for President, Inc. ("DJT Committee"), U.S. Congressman Daniel Bishop, U.S. Congressman Gregory F. Murphy, Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), and the North Carolina Republican Party ("NCRP") bring this action for preliminary

and permanent declaratory and injunctive relief against Defendants the North Carolina State Board of Elections; Damon Circosta, in his official capacity as Chair of the State Board of Elections; Stella Anderson, in her official capacity as Secretary of the State Board of Elections; and Jeff Carmon III in his official capacity as a Member of the State Board of Elections; and Karen Brinson Bell, in her official capacity as Executive Director of the State Board of Elections. Plaintiffs allege as follows:

BACKGROUND

1. This is an action to vindicate properly enacted election laws and procedures against an improper and ultra vires backroom deal publicly announced earlier this week. The deal, in the form of a purported "Consent Judgment," is between Defendants and a partisan group that, with its allies, has been announcing similar deals around the county. The intent and effect of the deal is to undermine the North Carolina General Assembly's carefully-considered, balanced structure of election laws. While touted as allowing greater access to voters during the current pandemic—an objective already addressed in recent months by the General Assembly—the actual effect is to undermine protections that help ensure the upcoming election will be not only safe and accessible but secure, fair, and credible.

2. The Elections Clause of the Constitution of the United States directs that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives *shall* be prescribed in each State by the Legislature thereof." Art. I, sec. 4. Likewise, the Electors Clause of the Constitution directs that "[e]ach State shall appoint, in Such Manner as the Legislature thereof may direct, a Number of [Presidential] electors." Art. II, sec. 1. The North Carolina General Assembly has fulfilled these solemn responsibilities by enacting, and updating as needed, a balanced, comprehensive election code.

3. Indeed, just three months ago, in response to the current pandemic, the General Assembly made several important revisions to the election code by passing House Bill 1169 ("HB 1169"). These revisions struck a careful balance between making voting accessible and safe for all qualified voters while ensuring the integrity of the election process with safeguards against irregularities, including fraud. This balance is a delicate one: if standards for voting are too strict, eligible voters may be unable to vote, but if standards are too lax, election outcomes can be compromised and confidence in the process eroded. The General Assembly understands that the people of North Carolina trust and expect their legislators to strike this balance, which is essential to sustain public confidence and participation in the democratic process.

4. Concern about election security and integrity, especially with regard to absentee ballots, is well-founded. According to the Commission on Federal Election Reform—a bipartisan commission chaired by former President Jimmy Carter and Secretary of State James A. Baker III, and cited extensively by the U.S. Supreme Court—absentee voting is "the largest source of potential voter fraud." Building Confidence in U.S. Elections 46, https://bit.ly/3dXH7rU (the "Carter-Baker Report").

5. The General Assembly is all too familiar with the threat and actuality of absentee ballot fraud in elections. In the 2018 congressional election in North Carolina's Ninth Congressional District, political operative L. McCrae Dowless directed an illegal scheme in which he and others undermined the results of the election by manipulating absentee ballots.[1] The State Board of Elections was forced to order a new vote because the "the corruption, the absolute mess

[1] Alan Blinder, *Election Fraud in North Carolina Leads to New Charges for Republican Operative*, N.Y. TIMES (July 30, 2019), https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html.

with the absentee ballots" irreparably tainted the election.[2] Perhaps most troubling, the scheme occurred undetected through the 2016 general election and was uncovered only after the 2018 primary election. As one of the prosecutors working on the case explained, "[w]hat has been challenging about this case and this investigation is that, as has been widely reported, *certain activity has gone on for years*."[3]

6. The Dowless scheme was, unfortunately, not unique. Voter fraud is a legitimate threat to free and fair elections. Examples of such fraud are widespread, and they have extended over several years. From 2018 to 2020, there were at least 15 instances of fraudulent use of absentee ballots discovered throughout the country, including in Virginia, Florida, and Arizona.

7. In a comprehensive article on absentee ballot fraud, the New York Times confirmed that "votes cast by mail are . . . more likely to be compromised and more likely to be contested than those cast in a voting booth, statistics show."[4] Absentee ballots pose a number of issues that create the potential for fraud, issues that are particularly clear with respect to elderly voters. One practice involves people affiliated with campaigns "helping" senior citizens in nursing homes, who can be "subjected to subtle pressure, outright intimidation or fraud," while "their ballots can be intercepted both coming and going."[5] As a result of these and other weaknesses in absentee ballots, fraud in voting by mail is "vastly more prevalent than in-person voting."[6] For instance, "[i]n Florida, absentee-ballot scandals seem to arrive like clockwork around election time," and mayoral elections in Illinois and Indiana and have been invalidated because of "fraudulent absentee

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[2] *Id.*

[3] *Id.* (emphasis added).

[4] Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES (Oct. 6, 2012).

[5] *Id.*

[6] *Id.*

ballots."[7] According to a Yale law professor, the comparative ease of absentee ballot fraud explains why "*all the evidence of stolen elections* involves *absentee ballots* and the like."[8] Indeed, "[v]oting by mail is now common enough and problematic enough that election experts say there have been *multiple elections* in which no one can say with confidence which candidate was the deserved winner."[9]

8. More recent examples abound. A New Jersey state court found that a local election held this year was "rife with mail in vote procedure violations." The results of that election were set aside and the election is being rerun.[10] In August, a California man "pleaded guilty of casting fraudulent mail-in ballots on behalf of his dead mother in three different elections."[11] And just this week, federal authorities began investigating the mishandling of absentee ballots in Pennsylvania, where local officials discovered that nine valid ballots were discarded (seven of which were votes for President Trump).[12]

9. Courts have repeatedly cautioned that absentee ballots are uniquely susceptible to fraud. As Justice Stevens has noted, "flagrant examples of [voter] fraud ... have been documented throughout this Nation's history by respected historians and journalists," and "the risk of voter fraud" is "real" and "could affect the outcome of a close election." *Crawford*, 553 U.S. at 195-196 (plurality op. of Stevens, J.) (collecting examples). Similarly, Justice Souter observed that mail-

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[7] *Id.*

[8] *Id.* (emphasis added).

[9] *Id.* (emphasis added).

[10] https://www.wsj.com/a-mail-in-voting-redo-in-new-jersey-11598050780 (last accessed Aug. 24, 2020).

[11] Sophie Mann, *California Man Pleads Guilty to Mail-In Ballot Fraud After Voting for Dead Mother in Three Elections* (Aug. 19, 2020), available at https://justthenews.com/politics-policy/elections/california-man-charged-mail-ballot-fraud-after-voting-his-dead-mother#article.

in voting is "less reliable" than in-person voting. *Crawford*, 553 U.S. at 212, n.4 (Souter, J., dissenting) ("'election officials routinely reject absentee ballots on suspicion of forgery'"); *id*. at 225 ("absentee-ballot fraud … is a documented problem in Indiana").

10. With a surge in absentee voting expected in the upcoming November 2020 election-- the website for the North Carolina Board of Elections reports, as of September 24, 2020, that 1,028,648 persons had already requested an absentee ballot[13]—prudent legislators and election administrators understand the fertile opportunities for fraud. Accordingly, the General Assembly struck a proper balance between accessibility and security.

11. Notwithstanding the General Assembly's thoughtful and responsible action, the State Board of Elections undid this careful balance by publicly announcing an illegitimate backroom deal that would undermine the protections against fraud. Not only is this bad—indeed terrible—policy, it also usurps the power vested with the North Carolina General Assembly by the Constitution of the United States.

12. The Board's actions cannot stand and, through this Complaint, Plaintiffs urge the Court to enjoin them.

NATURE OF THE ACTION

13. The U.S. Constitution entrusts state legislatures to set the time, place, and manner of elections and to determine how the state chooses electors for the presidency. *See* U.S. Const. art. I, §4 and art. II, §1.

[13] *See* https://www.ncsbe.gov/.

14. In June, the North Carolina General Assembly enacted House Bill 1169 ("HB 1169")[14] to prepare for the administration of the upcoming election amid the ongoing COVID-19 pandemic. The law is intended to protect the safety of voters, ease some ballot procedures to ensure that vulnerable individuals are able to vote without undue risks to their health, and ensure the integrity of votes cast in the election—especially by absentee ballot.

15. Although the General Assembly passed the HB 1169 by overwhelming bipartisan majorities, and although the North Carolina Board of Elections vigorously and successfully defended those statutes in two court cases (one in in the U.S. District Court for the Middle District of North Carolina and the other in Wake County Superior Court), the Board recently, and abruptly, announced a secretly-negotiated "Consent Order" (the "deal") that, as detailed below, directly contradicts North Carolina law and usurps the General Assembly's authority.

16. Moreover, and importantly, the purported "Consent Order" is a component of a nation-wide strategy formulated by lawyers for the Democratic Party Committees. That strategy is inaptly-named "Democracy Docket." On its website, the organizers of the "Democracy Docket" boast involvement in over 56 lawsuits in 22 states around the country by Democratic Party committees and their allies to rewrite election laws in the state and federal courts. Marc Elias, "Committed to Justice," On the Docket Newsletter (Sept. 2020), https://www.democracydocket.com/category/otd/. But rather than litigating those cases to conclusion—because they might and most often do lose on their challenges, as they have in North Carolina—the emerging strategy is to cut backroom deals with friendly state election officials to eviscerate statutory protections against fraud, sow confusion among the electorate and election

[14] *See* An Act to Make Various Changes to the Laws Related to Elections and to Appropriate Funds to the State Board of Elections in Response to the Coronavirus Pandemic, S.L. 2020-17 (June 15, 2020).

officials, and extend the November 2020 election to mid-November or beyond. Already, this strategy has played out in purported "consent decrees" with complaisant election officials in Virginia,[15] Rhode Island,[16] Minnesota,[17] Arizona,[18] and Georgia.[19] It is now plain that this effort to take the responsibility for election laws from the state legislatures, where it is vested by Article I, section 4 of the Constitution, and place it in the courts, is actually an "anti-Democracy project" to thwart the will of the people and undermine the integrity of the 2020 election.

17. Second, on the same day as the Consent Judgment, the Board issued several policy memoranda related to absentee voting procedures that eviscerated anti-fraud measures enacted by the General Assembly. On information and belief, these memoranda are part and parcel of the illegitimate deal described above.

18. These abrupt changes only six weeks before the November election were not authorized by state law and usurp the General Assembly's authority to regulate the "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives" under the U.S. Constitution. Accordingly, the voting procedures are invalid and must be enjoined.

19. The new system adopted by the Board of Elections will violate eligible citizens' right to vote by, among other things, allowing absentee ballots to be cast late and without proper witness verification, which invites fraud, coercion, theft, and otherwise illegitimate voting.

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[15] *League of Women Voters of Va. v. Va. State Bd.*, No. 6:20-cv-00024, Dkt. Nos. 110 (W.D. Va. Aug. 21, 2020).

[16] *Common Cause R.I. v. Gorbea*, 20-cv-00318-MSM-LDA, 2020 WL 4365608 (D. RI July 30, 2020).

[17] *LaRose v. Simon*, No. 62-CV-20-3149, Consent Decree (Ramsey Cty. Dist. Ct. July 17, 2020).

[18] *Voto Latino Found. v. Hobbs*, No. 2:19-cv-05685-DWL, Settlement Agreement, Dkt. 57-1 (D. Az. June 18, 2020).

[19] *Democracy Party of Georgia, et al. v. Raffensperger, et al.*, No. 1:19-cv-05028-WMR, Compromise Settlement Agreement, Dkt. 56-1 (D. Ga. Mar. 6, 2020).

20. Fraudulent and invalid votes dilute the votes of honest citizens and deprive them of their rights under the Fourteenth Amendment. Just as important, failure to ensure election integrity by adopting insufficient safeguards against fraud erodes public confidence and suppresses participation in the election process.

21. For all the reasons detailed in this Complaint, the actions by the Board of Elections are illegal and must be enjoined.

JURISDICTION AND VENUE

22. This Court has jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1343 because this case arises under the U.S. Constitution and the laws of the United States, and because Plaintiffs seek equitable and other relief for the deprivation of constitutional and federal statutory rights under color of state law.

23. This Court has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

24. Venue is appropriate in the Eastern District of North Carolina, under 28 U.S.C. § 1391(b)(1), because defendants are located in this District and many of the acts at issue occurred in this District.

PARTIES

25. Patsy J. Wise is a registered voter in Sampson County, North Carolina, and has already cast her absentee ballot for the November 3, 2020 election, and mailed it in, all in accordance with statutes, including the Witness Requirement, enacted by the General Assembly. Ms. Wise was shocked to learn of the actions taken by the Board of Elections as described in this Complaint, and has a serious concern that her vote will be negated by improperly cast or fraudulent ballots.

26. Regis Clifford is a registered voter in Mecklenburg County, North Carolina, and intends to vote in the November 3, 2020 election. Mr. Clifford was also shocked to learn of the actions taken by the Board of Elections as described in this Complaint, and has a serious concern that his vote will be negated by improperly cast or fraudulent ballots.

27. Camille Annette Bambini is a registered voter in Mecklenburg County, North Carolina, and intends to vote in the November 3, 2020 election. Ms. Bambini was shocked to learn of the actions taken by the Board of Elections as described in this Complaint, and has a serious concern that her vote will be negated by improperly cast or fraudulent ballots

28. Samuel Grayson Baum is a registered voter in Forsyth County, North Carolina, and intends to vote in the November 3, 2020 election. Mr. Baum was shocked to learn of the actions taken by the Board of Elections as described in this Complaint, and has a serious concern that his vote will be negated by improperly cast or fraudulent ballots.

29. Plaintiff Donald J. Trump for President, Inc. is the principal committee for President Donald J. Trump's reelection campaign. The DJT Committee is registered as a candidate committee with the Federal Election Commission pursuant to 52 U.S.C. § 30101(5) and 11 C.F.R. § 102.1. Its headquarters are located at 725 Fifth Avenue, 15th Floor, New York City, NY 10022.

30. The DJT Committee spends resources, including hiring campaign staff in North Carolina to encourage North Carolinians to reelect the President. It also spends significant sums of money in the state to further those interests. Changes to North Carolina election procedures require the committee to change how it allocates its resources, and the time and efforts of its campaign staff, to achieve its electoral and political goals. The DJT Committee believes the improper and ultra vires actions of the Board of Elections to change the rules governing the 2020

election threaten the integrity and fairness of the election process, and directly threaten the President's prospects for reelection.

31. James Daniel Bishop is a Republican Member of the United States House of Representatives representing the citizens of the Ninth Congressional District of North Carolina. Congressman Bishop will appear on the ballot as candidate for re-election in the November 3, 2020 general election.

32. Gregory F. Murphy is a Republican Member of the United States House of Representatives representing the citizens of the Third Congressional District of North Carolina. Congressman Murphy will appear on the ballot a candidate for re-election in the November 3, 2020 general election.

33. The RNC is a national political party with its principal place of business at 310 First Street S.E., Washington D.C., 20003. It is registered as a national political party committee with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14).

34. The RNC represents over 30 million registered Republicans in all 50 states, the District of Columbia, and the U.S. territories. It also comprises 168 voting members representing state Republican Party organizations, including members in North Carolina.

35. The RNC organizes and operates the Republican National Convention, which nominates a candidate for President and Vice President of the United States.

36. The RNC works to elect Republican candidates to state and federal office. In November 2020, its candidates will appear on the ballot in North Carolina for local, state, and federal offices.

37. The RNC has a vital interest in protecting the ability of Republican voters to cast, and Republican candidates to receive, effective votes in North Carolina elections and elsewhere.

The RNC brings this suit to vindicate its own rights in this regard, and in a representational capacity to vindicate the rights of its affiliated voters and candidates.

38. The RNC also has an interest in preventing abrupt and unlawful changes to North Carolina election laws because they can confuse voters, undermine confidence in the electoral process, and create an incentive to remain away from the polls. Such changes to North Carolina voting procedures require the RNC to divert resources and spend significant amounts of resources educating voters on those changes and encouraging them to vote regardless of the changes.

39. Plaintiff NRSC is a national political party committee with its principal place of business at 425 2nd St NE, Washington, D.C. 20002. It is registered as a national political party committee with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14). Its leadership is elected by the sitting Republican members of the United States Senate, including Senator Thom Tillis, who will be on the ballot for reelection in North Carolina on November 3, 2020.

40. The NRSC is the only national political party committee exclusively devoted to electing Republican candidates to the U.S. Senate, and it spends significant resources in North Carolina on this mission. The committee will devote resources to inform voters of election procedures and to monitor the results of the Senatorial election in North Carolina. Changes to North Carolina voting procedures require the committee to change how it allocates its resources, and the time and efforts of its staff, to achieve its electoral and political goals.

41. Plaintiff NRCC is the national organization of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives. It is registered as a national political party committee with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14). Its membership comprises the sitting Republican members of the United States House of

Representatives, including 9 Members from North Carolina, several of whom will be on the ballot for reelection on November 3, 2020.

42. A critical part of the NRCC's mission is to support Republican candidates for the U.S. House of Representatives in elections throughout the country, including in North Carolina.

43. In the 2020 election, the NRCC will be supporting candidates for Congress. For this reason, the NRCC has a strong interest in protecting the integrity, fairness, and security of election procedures throughout the United States, including in North Carolina, and in ensuring that properly enacted statutes are respected, enforced, and followed.

44. Plaintiff NCRP is a North Carolina state political party organization recognized under state and federal law. *See* 11 C.F.R. 100.15; N.C. Gen. Stat. § 163-96.

45. A fundamental focus of the NCRP's mission is to support Republican candidates running in North Carolina elections. In the 2020 election, the NRCP will be supporting a full slate of candidates for elected office in the State of North Carolina.

46. Defendant North Carolina State Board of Elections is the agency responsible for the administration of the election laws of the State of North Carolina.

47. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections. Mr. Circosta is sued in his official capacity.

48. Defendant Stella Anderson is a Member and the Secretary of the North Carolina State Board of Elections. Ms. Anderson is sued in her official capacity.

49. Defendant Jeff Carmon III is a Member of the North Carolina State Board of Elections. Mr. Carmon is sued in his official capacity.

50. Defendant Karen Brinson Bell is the Executive Director of the North Carolina State Board of Elections. Ms. Brinson is sued in her official capacity.

STATEMENT OF FACTS

A. North Carolina's Absentee Ballot Integrity Statutes

51. In 2001, the General Assembly made absentee voting available to all voters, who may choose to vote absentee for no stated reason. N.C. Gen. Stat. § 163-226(a). Recognizing, however, that absentee voting by its nature is less transparent than voting in person, the General Assembly has for a long time adopted several related provisions to ensure that absentee voting would be conducted without fraud or suspicion of fraud, that absentee voting could be administered in an efficient and fair way, and that public confidence in the election process and results would be maintained.

52. Among those provisions was the Witness Requirement. To cast a valid absentee ballot, North Carolina law ordinarily requires a voter to mark a ballot "in the presence of two persons who are at least 18 years of age," and to "[r]equire those two persons . . . to sign application and certificate as witnesses and to indicate those persons' addresses." N.C.G.S. § 163-231(a) [the "Witness Requirement"].

53. In addition, N.C.G.S. § 163-231 states that absentee ballots must be returned "not later than 5:00 P.M. on the day of the statewide primary or general election or county board election." *Id.* § 231(b)(1). The law also explicitly states that any ballots received after 5:00 PM on the day of the election "**shall not be accepted** unless . . . [1] the ballots issued under this Article are postmarked and that postmark is dated on or before the day of the statewide primary or general election or county bond election [the "Postmark Requirement"] and [2] are received by the county board of elections not later than three days after the election by 5:00 p.m. [the "Receipt Deadline"]" *Id.* § 231(b)(2) (emphasis added).

54. North Carolina law also regulates who may return an absentee ballot and where it may be returned (the "Ballot Harvesting Ban"). Ballot harvesters are usually third parties (*i.e.,* campaign workers, union members, political activists, paid personnel, volunteers, or others) who go door-to-door and offer to collect and turn in ballots for voters. "In some documented cases, the workers collecting the ballots have entered into voters' homes to help them retrieve and fill out their ballots." S. Crabtree, "Amid Covid Mail-In Push, CA Officials Mum on Ballot Harvesting," RealClear Politics (Apr. 24, 2020) (available at *https://www.realclearpolitics.com/articles/2020/04/24/amid_covid_mail-in_push).* Ballot harvesting gives unknown third parties the opportunity to tamper with absentee ballots or dispose of ballots rather than returning them to the county for tallying. As the Carter-Baker Report explains: "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." Carter Baker Report, p. 46. One other well-recognized procedural safeguard to prohibit fraud through ballot harvesting is to prohibit third parties from collecting and returning another person's absentee or mail-in ballot.

B. North Carolina's Response to the COVID-19 Pandemic in an Election Year

55. Since early 2020, North Carolina and the rest of the Nation have been responding to the COVID-19 pandemic. President Trump responded to reports of a "novel coronavirus" by taking a series of steps to limit its spread in the United States, leading up to an Executive Order on March 13, 2020 declaring a national emergency. Like other states, North Carolina has responded to the COVID-19 pandemic by implementing public health measures that are designed to reduce transmission rates and enable residents to safely undertake a wide range of activities—including voting in person or by absentee ballot.

56. Governor Roy Cooper declared a state of emergency in North Carolina beginning on March 10, 2020. *See* Governor Cooper, Executive Order No. 116, at 1 (Mar. 10, 2020).[20] He has subsequently issued a series of executive orders containing health and safety directives in an attempt to reduce North Carolina's COVID-19 case count and death rate. Governor Cooper, Executive Order No. 163, at *2 (Sept. 4, 2020).[21]

57. North Carolina's General Assembly recognized the need to adjust its voting procedures for the 2020 general election in response to the pandemic, and it took swift action address those concerns, including by amending absentee ballot procedures, by enacting HB 1169.

58. Before passing HB 1169, the General Assembly spent a month and a half working on the bill[22] and considered many proposals. Before then, the State Board of Elections proposed reducing the witness requirement for absentee ballots to one witness or replacing it with signature matching software. Moreover, the General Assembly had the benefit of information about other primary elections conducted during the pandemic. The General Assembly was also aware of concerns that the United States Postal Service might face challenges in delivering mail-in absentee ballots.

59. The General Assembly was also intimately familiar with the recent election in North Carolina's Ninth Congressional District, which was tainted by "absentee ballot fraud" and needed to be held anew. From that incident, the General Assembly understood the importance of

[20] *Available at* https://files.nc.gov/governor/documents/files/EO116-SOE-COVID-19.pdf.

[21] *Available at* https://files.nc.gov/governor/documents/files/EO163-Phase-2.5-Tech-Corrections_0.pdf.

[22] Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), *available at* https://carolinapublicpress.org/30559/nc-house-passes-bipartisan-election-bill-to-fund-covid-19-response/. (listing many proposals and quoting Rep. Allison Dahle, D-Wake as saying "lawmakers have been working on this bill for a month and a half.").

restricting who can assist voters with the request for, filling out, and delivery of absentee ballots in order to prevent practices such as ballot harvesting. *See* Mar. 13, 2019 Order of the North Carolina State Board of Elections in *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District*, SBE_000001-46 at 2 (ordering new election).

60. In June 2020, HB 1169 passed with overwhelming bipartisan majorities, by a vote of 105-14 in the North Carolina House and by a vote of 37-12 in the North Carolina Senate.[23] Governor Cooper, a Democrat, promptly signed the bill into law.

61. In view of the pandemic, HB 1169 eases the Witness Requirement for the November 2020 election by reducing the required number of witnesses for an absentee ballot from two to one Session Law. 2020-17 (HB 1169) states very clearly, however, that ballots must still abide by the other requirements of N.C.G.S. § 163-231(a), and that a ballot may only be accepted "provided that the [witness] signed the application and certificate as a witness and printed that person's name and address on the container-return envelope." S.L. 2020-17 § 1.(a). On information and belief, the General Assembly considered, and rejected, calls to eliminate the Witness Requirement altogether.

62. In addition to these changes, HB 1169 also:

- Allowed voters to call the State or county board of elections to request a blank absentee ballot request form be sent to the voter via mail, e-mail, or fax. *Id* § 5(a);
- Enabled voters to request absentee ballots online. *Id.* § 7.(a).
- Allowed completed requests for absentee ballots to be returned in person or by mail, e-mail, or fax. *Id.* § 2.(a).

[23] HB 1169, Voting Record, *available at* https://www.ncleg.gov/BillLookUp/2019/H1169.

- Permitted "multipartisan team" members to help any voter complete and return absentee ballot request forms. *Id.* § 1.(c).
- Provided for a "bar code or other unique identifier" to track absentee ballots. *Id.* § 3.(a)(9).

These changes balanced the public health concerns of the pandemic against the legitimate needs for election security.

C. Court Decisions Affirming the General Assembly's Voting Procedures

63. As part of a nationwide campaign to try to change duly enacted election laws and procedures in the courts, scores of lawsuits have been filed throughout the Nation seeking to loosen protections on absentee voting. In North Carolina alone, seven lawsuits have been filed challenging various duly-enacted provisions of the State's election laws. At least five of these suits seek to eliminate the Witness Requirement. These efforts have been strikingly unsuccessful.

64. On June 5, 2020, plaintiffs in *Democracy North Carolina v. North Carolina State Bd. of Elections*, No. 1:20-cv-457, __ F. Supp. 3d ___, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) ("Democracy North Carolina") filed a motion for a preliminary injunction alleging that North Carolina's Witness Requirement violated the First and Fourteenth Amendments to the U.S. Constitution. The plaintiffs in *Democracy North Carolina* lived alone, had preexisting conditions, and did not feel comfortable asking someone to witness the completion of their ballots. *Id.* at *24. On these bases, they alleged that the Witness Requirement unconstitutionally burdened their right to vote, and that North Carolina's interest in enforcing the Requirement did not outweigh this burden. *Id.* The plaintiffs further alleged that the Witness Requirement would impact 1.1 million single member households. *Id.* Voters, they alleged, must choose between sacrificing their health

to vote in person or comply with the Witness Requirement, or foregoing the right to vote. *See Democracy North Carolina*, Am. Comp. ¶¶ 99–100 (Dkt. No. 30, June 18, 2020).

65. The Board of Elections mounted a vigorous defense of existing voting regulations and the amended procedures enacted by the General Assembly by participating in depositions, arguing at court hearings, and filing a 47-page brief and five affidavits/declarations. The oppositions included a detailed declaration by Karen Brinson Bell, Board Executive Director of the Board of Elections (Dkt. No. 50 & 50-1). The Board of Elections argued, and Executive Director averred, that the Witness Requirement is justified by a State interest in preventing voter fraud. *Id.*

66. After a three-day evidentiary hearing and extensive argument, the District Court rejected these claims by the Plaintiffs in a comprehensive 188-page opinion and order. *See Democracy North Carolina*, 2020 WL 4484063. The District Court held that the plaintiffs were unlikely to succeed on their challenge to the Witness Requirement, and denied their request for a preliminary injunction against that provision. *Id.* at *33.

67. The District Court observed that the "disagreement between [the plaintiffs and the state was] largely dependent on the degree of risk and the resulting danger posed by that risk as imposed by the [ ] Witness Requirement on voter health." *Id.* at *25,

68. After considering extensive evidence from several medical professionals, including treating physicians and epidemiologists, the court ruled that a "voter should be likely able to fill out and sign the two-page ballot in a relatively short period of time, including the witnessing process, in fewer than ten minutes," and therefore a person could "vote absentee by mail without serious risk by adhering to social distancing measures and following all CDC guidelines." *Id.* at *33. Any risk of touch transmission could be "mitigated, if not completely eliminated, by surface

cleaning and handwashing in accordance with CDC guidelines." *Id.* As a result, the Witness Requirement was not "unduly burdensome on even high-risk voters." *Id.* The court accordingly denied the plaintiffs' request for injunctive relief against the Witness Requirement. *Id.* at *64.

69. On September 3, a three-judge panel in another case filed in Wake County Superior Court, *Chambers v. North Carolina*, Case No. 20-CVS-500124 (Sept. 3, 2020), denied Plaintiffs' motion for preliminary injunction concerning the Witness Requirement. *See* Order (Sept. 3, 2020). The Board of Elections was, again, named as a Defendant and, again, the State vigorously defended the General Assembly's voting procedures. Again, the State argued that the Witness Requirement is essential to deterring, detecting, and punishing voter fraud, and ensuring the integrity of North Carolina's elections. *See* State Def. Response to Mot. for Preliminary Inj., at 2, 31-33 (Aug. 26, 2020); State Def. Response to Mot. for Preliminary Inj., Ex. 1, Bell Affidavit ¶ 7 (Aug. 26, 2020).

70. After briefing with evidentiary submissions by the State and holding a hearing, the three-judge panel held there was not a substantial likelihood that Plaintiffs would prevail on the merits of their claims regarding the Witness Requirement. *See id.* at 6. The court specifically held that "the equities do not weigh in [Plaintiffs'] favor" because of the proximity of the election, the tremendous costs that the plaintiffs' request would impose on the State, and the confusion it would cause voters. *Id.* at 7. The panel also determined that changes requested by Plaintiffs "will create delays in mailing ballots for *all* North Carolinians voting by absentee ballot in the 2020 general election and would likely lead to voter confusion as to the process for voting by absentee ballot." *Id.* (emphasis in original).

71. Following the Court's ruling, the Board of Elections proceeded, pursuant to a statutory requirement, to mail absentee ballots to "more than 650,000" voters who had requested them. *See The November Election Season Has Officially Started, as North Carolina Begins*

Sending Out Mail Ballots, The Washington Post (Sept. 4, 2020) (indicating that on Sept. 4, the North Carolina had already begun mailing out more than 650,000 absentee ballots to voters). As of September 25, 2020, the Board of Elections website indicates that 1,028,648 voters have requested absentee ballots, and that 239,705 completed ballots have already been returned. *See* https://www.ncsbe.gov/results-data/absentee-data.

D. Additional State Lawsuits Attempting to Overturn the General Assembly's Voting Statutes.

72. *Democracy North Carolina* and *Chambers* were not the only cases involving the Board of Elections in which Plaintiffs challenged voting laws enacted by the General Assembly. Five other cases have been filed before the Wake County Superior Court in North Carolina.[24]

73. On May 4, 2020, the North Carolina Board of Elections and its members were sued in *Stringer v. State*, Case No. 20-CVS-5615 (Wake Cty. Sup. Ct.). Plaintiffs in the case challenged several absentee ballot procedures including the Witness Requirement, the Receipt Deadline, the Postmark Requirement, and the requirement that the signature on an absentee ballot match the signature of the registered voter that is on file with the county.

74. On July 8, 2020, the *Stringer* plaintiffs filed an amended complaint seeking declaratory relief that these requirements as amended in HB 1169, among others, violated the North Carolina Constitution. The *Stringer* plaintiffs also sought injunctive relief (1) prohibiting enforcement of the Witness Requirement, (2) extending the Receipt Deadline to match the deadline for military and overseas voters, (3) changing the burden of proof on the Postmark Requirement

[24] *See Advance North Carolina v. North Carolina*, Case No. 20-CVS-2965; *North Carolina Dem. Party*, Case No. 19-CVS-14688, *Democratic Senatorial Campaign Committee v. N.C. State Bd. of Elections*, No. 20-CVS-9947, *Stringer v. North Carolina*, Case No. 20-CVS-05615, and *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, Case No. 20-CVS-8881.

and expanding the meaning of "postmark," and (4) requiring the State to provide postage free of charge to voters, in addition to seeking attorneys' fees. *See* Stringer, Case No. 20-CVS-5615, Am. Compl. ¶ 6 & Prayer for Relief.

75. And on August 10, 2020, the Board of Elections was sued in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, Case No. 20-CVS-8881 (Wake Cty. Sup. Ct.) ("*NC Alliance*"). The *NC Alliance* suit was brought by the same attorneys as the *Stringer* suit and the two complaints are very similar, but unlike *Stringer*, the *NC Alliance* Complaint purported to be an "as applied" rather than a "facial challenge" to the statutory provisions. On information and belief, the *NC Alliance* plaintiffs sought, by asserting an as applied challenge, to avoid assignment of the case to a three-judge court as required by N.C. Gen. Stat. § 1-267.1.

76. The Plaintiffs in *NC Alliance* challenged the same provisions as the *Stringer* plaintiffs, including the Witness Requirement and the Receipt Deadline. But the *NC Alliance* plaintiffs also challenged some new provisions, including the State's restrictions on persons who can assist a voter to complete an absentee ballot application and the ban on harvesting ballots. *See* N.C. Alliance, Case No. 20-CVS-8881, Amended Complt. ¶ 7 & Prayer for Relief (Aug. 18, 2020).

77. Like the *Stringer* plaintiffs, the *Alliance* plaintiffs requested declaratory relief that these requirements, among others, were unconstitutional and an injunction against their enforcement.

78. As of September 21, briefing on Plaintiffs' motions for preliminary injunction in both *Stringer* and *NC Alliance* was underway, and the Court had scheduled hearings on both motions for October 2. At least 17 depositions were scheduled to occur between September 21st

and September 30th. On September 24, the court granted the Republican Groups' motion to intervene in *NC Alliance*.

79. But meanwhile, on September 21, 2020—only 11 days before hearings on both preliminary injunction motions—Plaintiffs and the Board of Elections publicly announced that they had reached a settlement and would seek a consent judgment (the "Consent Agreement"). The Consent Agreement is attached as Exhibit 1.

80. Plaintiffs and the BOE negotiated the Consent Agreement in secret and the BOE purported to approve it in a closed, secret session. The Board of Elections never consulted with either of their co-defendants Timothy K. Moore, Speaker of the North Carolina House of Representatives, or Philip E. Berger, President Pro Tempore of the North Carolina Senate (the "Legislative Defendants")[25] before publicly announcing the Consent Agreement.

81. Immediately upon announcing the Consent Agreement, the *Stringer* and *NC Alliance* plaintiffs abruptly withdrew their motions for preliminary injunction, unilaterally cancelled all remaining depositions, and announced they would seek court approval of the deal on October 2.

E. The State Board of Election's Vote Procedure Memoranda

82. In connection with the Consent Judgment, the Board of Elections issued three memoranda with new guidance to County Boards of Elections on administering the November general election (the "Numbered Memos"). The Numbered Memos are attached as Exhibits 2-4.

83. The Board of Elections contends that the Memoranda with revised procedures are effective pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which provide that the

[25] Although not originally named as defendants, the Legislative Defendants intervened in both *Stringer* and *Alliance* as a matter of right.

Executive Director of the Board of Elections "may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following: (1) A natural disaster[;] (2) Extremely inclement weather[;] or (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States." Neither the statute nor regulation identify health issues, including a pandemic, within the definition of "a natural disaster"[26] or "extremely inclement weather," and, of course, the COVID-19 pandemic has no relationship to an armed conflict involving armed forces of the United States. But even if the pandemic fell within those terms, the General Assembly has already addressed it in HB 1169. The Board is further limited by the Constitution of the United States.

84. The Board also contends it has the authority to implement the new measures pursuant to N.C. Gen. Stat. § 163-22(a), which provides that the Board "shall compel observance of the requirements of the election laws by county boards of elections and other election officers."

85. Far from observing the requirements of the election law, the Consent Agreement and the Numbered Memos directly and arrogantly usurp the General Assembly's authority as granted in Article I, section 4 of the United States Constitution, which vests authority to set the "Time, Places, and Manner of holding Elections for Senators and Representatives" exclusively in the State Legislature. The only exception is that the United States Congress may modify provisions duly enacted by a State Legislature. The Constitution recognizes no situation in which the

[26] "Natural disasters" and "extremely inclement weather" are defined to include hurricanes; tornados; storms or snowstorms; floods; tidal waves or tsunamis; earthquakes or volcanic eruptions; landslides or mudslides; or catastrophes arising from natural causes that result in a disaster declaration by the President of the United States or the Governor. *See* 08 NCAC 01 .0106(b)(1).

Executive Branch, or an Executive Branch agency, of a State may assert authority to enact such provisions.

86. The BOE's deal with the Plaintiffs directly usurps and overrides several election law statutes duly enacted by the General Assembly, and thus abridges Article I, section 4 of the United States Constitution. For example, Numbered Memo 2020-22 unilaterally extends the Receipt Deadline. Whereas the statute allows the counting of ballots postmarked by Election Day if they are received within **three (3)** days after Election Day, N.C.G.S. § 163-231(b)(2), Numbered Memo 2020-22 states that "[a]n absentee ballot shall be counted as timely if . . . the ballot is postmarked on or before Election Day and received by **nine** days after the election." Exhibit 3 at 1.

87. And then Numbered Memo 2020-22 proceeds unilaterally to undermine the Postmark Requirement. Whereas the General Assembly allows the counting of ballots properly postmarked by Election Day and received by the county board of elections up to three days after the election, N.C.G.S. § 163-231(b)(2), Numbered Memo 2020-22 states that a ballot shall be *considered postmarked* by Election Day if [1] it has a postmark affixed to it ***or*** [2] if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day. The Memo instructs the County Board of Elections that, if a container return envelope arrives after Election Day and does not have a postmark, then county board staff shall conduct research to determine if there is information in BallotTrax to determine the date the ballot was in the custody of USPS; if the envelope has a tracking number after Election Day, staff shall conduct research with the USPS or commercial carrier to determine the date it was in the custody

of USPS/the carrier." Exhibit 3, at 2 (emphasis added). This is in direct contravention of N.C.G.S. § 163-231(b)(2) which states that a ballot **must** have a postmark to be accepted after Election Day.

88. Moreover, Numbered Memo 2020-19 unilaterally negates the Witness Requirement, stating if a witness or assistant did not print their name, address, or sign the ballot, that the ballot may be cured by sending a certification *to the voter* for *the voter* to complete and return. Exhibit 2, at 2. Once the voter presents the requested certification, the ballot will be counted *with no witness*. This directly contradicts the requirements of current law, which states that a ballot may only be accepted if the witness "signed the application and certificate as a witness and printed that [witness'] name and address on the container-return envelope." S.L. 2020-17 at § 1.(a).

89. The Board of Elections has also purported to undermine the duly-enacted Ballot Harvesting Ban. But Numbered Memo 2020-23 states that "[a] county board shall *not disapprove* an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot," nor "solely because it is placed in a drop box" located at the office of the county board of elections. Exhibit 4, at 2-3.

90. Again, North Carolina law specifically prohibits the practices now promoted by the Board of Elections. The only absentee ballots that may be tallied in an election are those returned to the county board of elections no later than 5:00 p.m. on the day before election day in a properly executed container-return envelope *or* absentee ballots received pursuant to N.C. Gen. Stat. § 163-231(b)(ii) or (iii). *See* N.C. Gen Stat § 163-234(1). The latter category includes only ballots "transmitted by mail or by commercial courier service, at the voter's expense, or delivered in person, or by the voter's near relative or verifiable legal guardian." N.C. Gen. Stat. § 163-231(b).

91. Indeed, North Carolina law disapproves of these practices so strongly that it has made it a Class I felony for any person other than the voter's near relative or legal guardian to take

possession of an absentee ballot of another voter for delivery or return to a county board of elections. *See* N.C.G.S. § 163-223.6(a)(5). The effect of Numbered Memo 2020-23 would be to require counting of all the tainted ballots submitted by McCrae Dowless, even if the Board knew those ballots were obtained illegally.

CLAIMS

COUNT ONE

(Violation of Art. I, § 4 of the U.S. Constitution)

92. Plaintiffs incorporate all previous allegations set forth herein.

93. The United States Constitution provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by *the Legislature* thereof." U.S. Const. Art. I, § 4, cl. 1 (emphasis added).

94. The Legislature is "'the representative body which ma[kes] the laws of the people.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932).

95. Regulations of congressional and presidential elections, thus, "must be in accordance with the method which the state has prescribed for legislative enactments." *Id*. at 367; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 135 S. Ct. 2652, 2668 (U.S. 2015).

96. As detailed above, the Board of Elections has unilaterally changed the requirements and procedures for absentee voting in North Carolina, including the Witness Requirement, Postmark Requirement, Receipt Deadline, and prohibitions on Ballot Harvesting. These changes

97. The General Assembly could not, consistent with the Constitution of the United States, delegate to the Board of Elections the power to suspend or re-write the state's election laws. Nor did the General Assembly do so.

98. The Board of Election's changes violates the Article 1, § 4 of the U.S. Constitution.

99. Defendants have acted and will continue to act under color of state law to violate the Constitution.

100. The unlawful and abrupt changes to North Carolina voting procedures implemented by the North Carolina State Board of Elections are inflicting immediate and irreparable harm on the individual Plaintiffs, the Plaintiff candidates, the Republican Committees, their members, and supporters. The individual Plaintiffs, who have voted or intend to vote in the upcoming election, are at imminent risk of having their votes diluted and negated by the Board's actions. The candidate and the Republican Committees have spent substantial sums and expended significant time and resources to educate voters on North Carolina voting procedures. Due to the changes, they will lose the benefit of their previous efforts and must duplicate activities and spend additional sums to re-educate voters on the new requirements, which will divert their resources from get-out-the-vote efforts and candidate support.

101. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the Board of Election's changes.

COUNT TWO

(Violation of Art. II, § 1 of the U.S. Constitution)

102. Plaintiffs incorporate all their previous allegations set forth herein.

103. The United States Constitution provides that "[e]ach State shall appoint, in such Manner as *the Legislature* thereof may direct, a Number of Electors" for President. U.S. Const. Art. II, § 1, cl. 2 (emphasis added).

104. By changing the absentee ballot voting procedures, including the Witness Requirement, Postmark Requirement, Receipt Deadline, and prohibitions on Ballot Harvesting,

the Board of Elections changed the manner in which North Carolina voters will appoint electors during the November 3, 2020 presidential election.

105. Defendants are not "the Legislature," and therefore have no power under the Constitution determine the manner in which North Carolinians will appoint electors. *See* U.S. Const. art. II, § 1.

106. The General Assembly could not, consistent with the Constitution of the United States, delegate to the Board of Elections the power to suspend or alter the state's election laws. Nor did the General Assembly do so.

107. The specified actions of the Board of Elections violate the U.S. Constitution.

108. Defendants have acted and will continue to act under color of state law to violate the Constitution.

109. The changes to North Carolina voting procedures implemented by the North Carolina State Board of Elections are inflicting immediate and irreparable harm on the individual Plaintiffs, the Plaintiff candidates, the Republican Committees, their members, and supporters. The individual Plaintiffs, who have voted or intend to vote in the upcoming election, are at imminent risk of having their votes diluted and negated by the Board's actions. The Plaintiff candidates and the Republican Committees have spent substantial sums and expended significant time and resources to educate voters on North Carolina voting procedures and encouraged individuals to vote in the general election. Due to the changes, they will lose the benefit of their previous efforts and must duplicate activities and spend additional sums to re-educate voters on the new requirements, which will divert their resources from get-out-the-vote efforts and candidate support.

110. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the Board's changes.

COUNT THREE

(Dilution of the Right to Vote under the Fourteenth Amendment of the U.S. Constitution)

111. Plaintiffs incorporate all previous allegations set forth herein.

112. The right of qualified citizens to vote in a state election involving federal candidates is recognized as a fundamental right under the Fourteenth Amendment of the United States Constitution. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663, 665 (1966). *See also Reynolds*, 377 U.S. at 554 (The Fourteenth Amendment protects the "the right of all qualified citizens to vote, in state as well as in federal elections"). The right to vote includes not just the right to cast a ballot, but also the right to have it fairly counted if it is legally cast.

113. An individual's right to vote is infringed if his or her vote is cancelled or diluted by a fraudulent or illegal vote. *See Anderson*, 417 U.S. at 227. The United States Supreme Court has made this clear in several cases. *See, e.g., Gray v. Sanders*, 372 U.S. 368, 380 (1963) (every vote must be "protected from the diluting effect of illegal ballots"); *Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 196 (2008) (plurality op. of Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *accord Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964).

114. The changes made by the Board of Elections contravene validly enacted election laws and eliminate or drastically weaken protections against voter fraud, and risk dilution of honest votes by enabling the casting of fraudulent or illegitimate votes. This dramatically enhanced risk of fraudulent voting violates the right to vote. *Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226-27; *Baker*, 369 U.S. at 208.

115. Defendants' new, unauthorized voting system facilitates fraud and other illegitimate voting practices, and therefore violates the Fourteenth Amendment to the U.S. Constitution.

116. Defendants have acted and will continue to act under color of state law to violate the Fourteenth Amendment.

117. The unlawful and abrupt changes to North Carolina voting procedures implemented by the North Carolina State Board of Elections inflict immediate and irreparable harm on the individual Plaintiffs, the Plaintiff candidates, the Republican Committees, their members, and supporters. The individual Plaintiffs, who have voted or intend to vote in the upcoming election, are at imminent risk of having their votes diluted and negated by the Board's actions. The Plaintiff candidates and Republican Committees have spent substantial sums and expended significant time and resources to educate voters on North Carolina voting procedures. Due to the changes, they will lose the benefit of their previous efforts and must duplicate activities and spend additional sums to re-educate voters on the new requirements, which will divert their resources from get-out-the-vote efforts and candidate support.

118. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing changes to absentee ballot voting procedures.

COUNT FOUR

(Denial of Equal Protection Under the Fourteenth Amendment of the U.S. Constitution)

119. Plaintiffs incorporate all previous allegations set forth herein.

120. The Equal Protection Clause of the Fourteenth Amendment requires that "one person's vote must be counted equally with those of all other voters in a State." *Reynolds*, 377 U.S. at 560. In other words, "whenever a state or local government decides to select persons by popular election to perform governmental functions, [equal protection] requires that each qualified voter

must be given an equal opportunity to participate in that election … .” *Hadley, v. Junior College District*, 397 U.S. 50, 56 (1968).

121. Therefore, the Equal Protection Clause of the U.S. Constitution prevents the government from treating similarly situated voters differently without a compelling justification for doing so. *Bush v. Gore*, 531 U.S. 98, 104-5 (2000) (“[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”). The requirement of equal treatment is stringently enforced as to laws that affect the exercise of fundamental rights, including the right to vote.

122. Accordingly, the Equal Protection Clause requires states to “‘avoid arbitrary and disparate treatment of the members of its electorate.’” *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) (quoting *Bush*, 531 U.S. at 105); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *Gray*, 372 U.S. at 380 (“The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court’s] decisions.”).

123. “[T]reating voters differently” thus “violate[s] the Equal Protection Clause” when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros*, 249 F.3d at 954. Indeed, a “minimum requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote].” *Bush*, 531 U.S. at 105.

124. Defendants have significantly changed the procedures for casting absentee ballots, including the Witness Requirement, Postmark Requirement, Receipt Deadline, and prohibitions on Ballot Harvesting, after vigorously defending those procedures in litigation while voting in the November 2020 general election was occurring. Accordingly, the State Board of Elections has

treated voters who have already voted and complied with these requirements, such as Ms. Wise, differently from voters who have not yet voted in the November 3, 2020 general election. Ms. Wise and other similarly situated voters, in turn, have been denied equal treatment under the Fourteenth Amendment to the U.S. Constitution.

125. Defendants, through their acts or omissions, have violated the United States Constitution and infringed upon the equal protection rights of Plaintiffs, their members, and all qualified North Carolina voters.

126. Defendants have acted and will continue to act under color of state law to violate the Equal Protection Clause of the United States Constitution.

127. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined and compelled to enforce the mandates of the Election Code.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in their favor and award the following relief:

(a) A declaratory judgment that the "Consent Judgment" and related Numbered Memos violates the Art. I, §4, Art. II, § 1, and the Fourteenth Amendment to the U.S. Constitution;

(b) A permanent injunction prohibiting Defendants from implementing and enforcing the "Consent Judgment" and the related Numbered Memos; A temporary restraining order and preliminary injunction granting the relief specified above during the pendency of this action;

(c) Plaintiffs' reasonable costs and expenses, including attorneys' fees; and

(d) All other preliminary and permanent relief that Plaintiffs are entitled to, and that the Court deems just and proper.

Dated: September 26, 2020

Respectfully submitted,

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Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

PATSY J. WISE, REGIS CLIFFORD, CAMILLE ANNETTE BAMBINI, SAMUEL GRAYSON BAUM, DONALD J. TRUMP FOR PRESIDENT INC., U.S. CONGRESSMAN DANIEL BISHOP, U.S. CONGRESSMAN GREGORY F. MURPHY, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and NORTH CAROLINA REPUBLICAN PARTY, *Plaintiffs, vs.* THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS, *Defendants.*	Civil Action No. 5:20-cv-505

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Recent actions of the North Carolina Board of Elections threaten imminent and irreparable injury to the voters of this state, candidates running for election in November 2020, political parties, and all other persons invested in the political process. With over a million absentee ballots already requested for the election, and hundreds of thousands sent to voters, the Board has usurped the authority of the North Carolina General Assembly by unilaterally cutting a back room deal with Plaintiffs' political adversaries that will have the effect of eviscerating statutes guaranteeing a fair election. The harm is occurring now, and unless these actions are immediately enjoined, the harm will be irreparable.

The United States Constitution requires the North Carolina General Assembly to set the time, place, and manner for elections in the state and for choosing this state's presidential electors. *See* U.S. Const. art. I, § 4, cl. 1, art. II, § 1. Consistent with that authority, the General Assembly enacted and continues to modify a comprehensive election code. *See generally* N.C.G.S. § 163. It also created a Board of Elections ("BOE") to supervise elections with express limits on the BOE's power. Although the BOE has certain "emergency powers" and the power to make "reasonable rules and regulations," the BOE is required to avoid unnecessary conflict with the election code. N.C.G.S. §§ 163-27.1; 163-22(a).

In June 2020, the General Assembly responded to the COVID-19 pandemic by enacting HB 1169, which adapts the requirements and procedures for voting in the November 2020 election to the current circumstances. HB 1169 temporarily relaxes certain voting restrictions and appropriates additional funding so that the election may be conducted in a safe, efficient, and fair manner. The General Assembly considered many proposals before finalizing the bill, including several from the BOE. No side got everything it wanted, and a bipartisan compromise was reached that carefully balanced competing interests.

Although several partisan groups filed lawsuits in North Carolina state and federal court challenging the legislation, the two courts that have already addressed the issues left virtually all provisions intact. *See Democracy North Carolina v. North Carolina State Bd. of Elections*, No. 1:20-cv-457, 2020 WL 4484063, at *64 (M.D.N.C. Aug. 4, 2020) (granting limited relief but denying, among other things, a request for injunctive relief against witness requirement for absentee ballots); Leland Decl., Ex. 1, *Chambers v. N.C.,* Case No. 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Sept. 3, 2020) (denying request to enjoin witness requirement for absentee ballots).

Then, on September 22, with only 42 days until the November 3 general election, and ***after absentee voting had already begun***,[1] the BOE effectively rewrote important absentee voting provisions. It did so through a proposed Consent Judgment negotiated with the plaintiffs in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, No 20-CVS-8881 (Sup. Ct. Wake Cnty.), and three accompanying "Numbered Memos" of instruction to North Carolina County Boards of election. *See* Leland Decl., Ex. 2, Plaintiffs' and Executive Defendants' Joint Mot. for Entry of a Consent Judgment. In particular, the BOE's modifications purport to: (1) extend the deadline for receipt of mailed-in ballots from three days after election day, as plainly specified in the statute, to nine days after election day; (2) emasculate the statutory requirement that only mailed ballots postmarked by 5:00 p.m. on election day be counted; (3) effectively eliminate the statutory requirement that one person witness an absentee ballot; and (4) neuter restrictions on who can handle and return completed ballots. Many of these changes were specifically rejected by the General Assembly in June, and they are not necessary responses to COVID-19.

[1] State officials began mailing out ballots on September 4. *See* N.C.G.S. § 163-230.1(c).

Moreover, the purported "consent judgment" appears to be part of a nation-wide strategy formulated by lawyers for the Democratic National Committee. Ironically dubbed the "Democracy Docket," the group is funded by unreported contributions. As Marc Elias, the Democratic Party's top election lawyer and founder of Democracy Docket, put it, if litigation could lead to an increase of "1 percent of the vote [for Democrats], that would be among the most successful tactics that a campaign could engage in." Leland Decl., Ex. 3, Marc Elias Tweet. The "Democracy Docket" boasts that it has sponsored 56 lawsuits in 22 states around the country by Democratic Party committees and their allies to rewrite election laws in the state and federal courts. Leland Decl., Ex. 4, Marc Elias, "Committed to Justice," On the Docket Newsletter (Sept. 2020). But rather than litigating those cases to conclusions—because they might and most often do lose on their challenges, as they have in North Carolina—their emerging strategy is to cut backroom deals with friendly state election officials to eliminate statutory protections against fraud, sow confusion among the electorate and election officials, and extend the November 2020 election into mid-November or beyond. Already, this strategy has played out in purported "consent decrees" entered with complicit election officials in Rhode Island,[2] Virginia[3], Minnesota,[4] Arizona,[5] and Georgia.[6] This is an effort to take responsibility for election laws from the state legislatures, where it is vested by Article I, section 4 of the Constitution, and place it in the courts.

A temporary restraining order is required. The BOE's "Numbered Memos" that are an integral part of the backroom deal purport to be effective immediately, and with 1,028,648 requests

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2 *Common Cause R.I. v. Gorbea*, 20-cv-00318, 2020 WL 4365608 (D. RI July 30, 2020).

3 Leland Decl., Ex. 5, *League of Women Voters of Va. v. Va. State Bd.*, 20-cv-24, (W.D. Va. Aug. 21, 2020).

4 Leland Decl., Ex. 6, *LaRose v. Simon*, 62-CV-20-3149, (Ramsey Cty. Dist. Ct. July 17, 2020).

5 Leland Decl., Ex. 7, *Voto Latino Found. v. Hobbs*, 2:29-cv-05685 (D. Az. June 18, 2020).

6 Leland Decl., Ex. 8, *Democracy Party of Georgia, et al. v. Raffensperger, et al.*, 19-cv-05028-WMR, Compromise Settlement Agreement, Dkt. 56-1 (D. Ga. Mar. 6, 2020).

for absentee ballots already submitted through September 26,[7] and hundreds of thousands of absentee ballots already sent out, voters, like the individual Plaintiffs, are—right now, today—confronted with two election regimes—one legitimately enacted by the General Assembly, and one constructed by a rogue Executive Branch Commission.

Moreover, Plaintiffs are likely to succeed on the merits of their claims and will suffer irreparable harm if relief is not granted. The Republican Committees have expended considerable resources to get out the vote for their preferred candidates in North Carolina and to educate voters about North Carolina's election laws. They have already contacted, through door knocking, telephone calls, or mailings, more than 7.6 million households in North Carolina with pleas to vote for the Republican ticket and instructions on how to do so in accord with the legitimate election regime. These investments will be wasted if the BOE's changes remain in place. And the individual Plaintiffs either have voted or plan to vote in the upcoming election. The BOE's unilateral changes to North Carolina's voting laws—after absentee voting has already begun—will also cause widespread voter confusion. The remaining equities, which include North Carolina's interests in promoting fair and honest elections, safeguarding voter confidence in the integrity of election results, and administering orderly elections further necessitate a temporary restraining order. Against these equities, the BOE's unconstitutional and ultra vires actions carry no weight.

BACKGROUND

A. North Carolina's Election Code and the BOE's Role in Administering Elections

Today, North Carolina offers its citizen three ways to vote: (1) absentee voting by mail-in ballot, (2) in-person early voting, and (3) in-person voting on Election Day. The General Assembly

[7] Current number of absentee ballot requests available at https://www.ncsbe.gov/.

created the option for absentee voting in 1917,[8] and more recently expanded the absentee voting option to allow "no excuse" absentee voting; now anyone can vote absentee simply by complying with the safeguards enacted by the General Assembly. The availability of these three options maximizes election participation, but each is also regulated to ensure that elections are fair, honest, and secure.

The first option is to vote by absentee ballot. *See generally* N.C.G.S. § 163 art. 20. The BOE purported to modify this method through its Consent Judgment and Numbered Memos. North Carolina allows "[a]ny qualified voter of the State [to] vote by absentee ballot in a statewide . . . general . . . election." *Id.* § 163-226(a). Given the consensus that mail-in ballots present a higher risk of fraud than ballots submitted in person,[9] North Carolina enacted measures to deter and detect fraudulent mail-in ballots. As relevant here, the voter must complete and certify the ballot-return envelope in the presence of two witnesses (or a notary), who must certify "that the voter is the registered voter submitting the marked ballot[]" (the "Witness Requirement"). *Id.* § 163-231(a). The voter (or a near relative or verifiable legal guardian) can then deliver the ballot in person to the county board office or transmit the ballot "by mail or by commercial courier service, at the voter's expense, or delivered in person" not "later than 5:00 p.m. on the day of the" general election. *Id.* § 163-231(b)(1). A ballot would be considered timely if it was postmarked

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[8] *See Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 347 (1920).

[9] For example, a commission chaired by President Jimmy Carter and former Secretary of State James A. Baker, III found that voting by mail is "the largest source of potential voter fraud." Leland Decl., Ex. 9, Carter-Baker Report, at 46. Other commissions have reached the same conclusion, finding that "when election fraud occurs, it usually arises from absentee ballots." Leland Decl., Ex. 10, Morley Redlines Article, at 2. This is true for a number of reasons. For instance, absentee ballots are sometimes "mailed to the wrong address or to large residential buildings" and "might get intercepted." Leland Decl., Ex. 9, Carter-Baker Report, at 46. Absentee voters "who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id*. And "[v]ote buying schemes are far more difficult to detect when citizens vote by mail." *Id*. As one court put it, "absentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

by election day (the "Postmark Requirement") and received "by the county board of elections not later than three days after the election by 5:00 p.m." (the "Receipt Deadline"). *Id.* § 163-231(b)(2)(b). With limited exceptions, North Carolina law prohibits anyone except the voter's near relative or legal guardian from assisting a voter with the completion and submission of an absentee ballot (the "Assistance Ban" and "Ballot Delivery Ban"). *Id.* § 163-226.3.

The second option for North Carolina voters is one-stop early voting. *See id.* § 163-227.6. Under this provision, county boards can establish one or more early-voting locations, which the BOE must approve. *Id.* § 163-227.6(a). Those locations open on the third Thursday before Election Day, and early voting must be conducted through the last Saturday before the election. *Id.* § 163-227.2(b). North Carolina law mandates the hours at which the early voting sites must open, and requires that if "any one-stop site across [a] county is opened on any day . . . all one-stop sites shall be open on that day" ("Uniform Hours Requirement"). *Id.* § 163-227.6(c)(2).

The third option is in-person voting on election day. *See generally* § 163 art. 14A. As with the other two methods of voting, the General Assembly has prescribed a series of rules, to be administered by the BOE and county boards, to ensure that in-person voting is fair, efficient, and secure. *See id.*

The General Assembly created the BOE and empowered it with "general supervision" of elections and the authority "to make such reasonable rules and regulations" for elections. *Id.* § 163-22(a). The BOE's rules cannot "conflict with any provisions of" North Carolina's election code. *Id.* That is true even where exigent circumstances require the BOE to pass temporary rules or exercise emergency powers. The BOE can promulgate temporary rules should any provision of North Carolina's election code be held unconstitutional, provided that those rules "do not conflict with any provisions of . . . Chapter 163 of the General Statutes and such rules and

regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly." *Id.* § 163-22.2. And while, "upon recommendation of the Attorney General," the BOE can "enter into agreement with the courts in lieu of protracted litigation," it can only do so "until such time as the General Assembly convenes." *Id.*

The Executive Director may also exercise "emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by . . . [a] natural disaster[,] [e]xtremely inclement weather[, or certain] armed conflict[s]." N.C.G.S. § 163-27. These powers are similarly limited. The statute provides that in exercising this power, "the Executive Director ***shall*** avoid unnecessary conflict with the provisions of" the voting code. *Id*. (emphasis added). The statutory provisions concerning the BOE confirm that it cannot pass rules that conflict with North Carolina's election code.

B. The General Assembly Responds to the COVID-19 Pandemic

The General Assembly took decisive action in response to the COVID-19 pandemic and enacted HB 1169, which passed into law on June 12, 2020. The bill modified voting laws for the 2020 election and appropriated funding to ensure the election may be conducted in a safe, efficient, and fair manner.

Before enacting HB 1169, the Assembly spent a month and a half working on the bill[10] and considered many proposals. The BOE advanced several, including a proposal to reduce or eliminate the witness requirement for absentee ballots. Leland Decl., Ex. 12, State Bd. Mar. 26, 2020 Ltr. at 3. Moreover, the General Assembly had the benefit of information about other primary elections conducted during the pandemic, as well as reports of challenges faced by the United States Postal Service ("USPS"). The General Assembly was also familiar with the recent election

[10] Leland Decl., Ex. 11, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3.

in North Carolina's Ninth Congressional District, which was tainted by "absentee ballot fraud" and needed to be held anew, and from that incident understood the importance of restricting who can assist voters with the request for, filling out, and delivery of absentee ballots. *See* Leland Decl., Ex. 13, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019).

HB 1169 passed with overwhelming bipartisan majorities, by a vote of 105-14 in the House and by a vote of 37-12 in the Senate,[11] and was signed by Governor Cooper. Members lauded the bill: As Democrat representative Allison Dahle remarked, "[n]either party got everything they wanted," but the "compromise bill" was "better for the people of North Carolina."[12] For the November 2020 election, among other things, the General Assembly:

- Reduced the number of witnesses required for absentee ballots to one person instead of two, HB 1169 § 1.(a).
- Allowed voters to call the State or county board of elections to request a blank absentee ballot request form be sent to the voter via mail, e-mail, or fax. *Id* § 5(a).
- Enabled voters to request absentee ballots online. *Id.* § 7.(a).
- Allowed completed requests for absentee ballots to be returned in person or by mail, e-mail, or fax. *Id.* § 2.(a).
- Permitted "multipartisan team" members to help any voter complete and return absentee ballot request forms. *Id.* § 1.(c).
- Provided for a "bar code or other unique identifier" to track absentee ballots. *Id.* § 3.(a)(9).
- Appropriated funds "to prevent, prepare for, and respond to the coronavirus pandemic during the 2020 federal election cycle." *Id*. § 11.1.(a).

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11 Leland Decl., Ex. 14, HB 1169, Voting Record.

12 *See* Leland Decl., Ex. 11, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

These changes balanced the public health concerns of the pandemic against the legitimate needs for election security. To balance the public health concerns against the interests in election security and orderly administration, the General Assembly retained several provisions, including (1) the Postmark Requirement, (2) the three-day Receipt Deadline, (3) the Assistance Ban and Ballot Delivery Ban, and (4) a reduced one-person Witness Requirement.

C. The Republican Committee's Voter Education and Get out the Vote Efforts

Since the enactment of SB 1169, the Republican Committees have invested significant resources, time, and effort in educating voters about North Carolina's voting procedures and regulations in order to ensure that Republicans' votes are successfully counted in the November election. *See* Leland Decl., Ex. 15, Dore Decl. ¶¶ 11-13; Leland Decl., Ex. 16, White Decl. ¶¶ 7-10; Leland Decl., Ex. 17, Dollar Decl. ¶¶ 10-11; Leland Decl., Ex. 18, Clark Decl. ¶¶ 7-9. For example, the NCRP spent $250,000 in support of door-knocking efforts to educate voters, and over $2.2 million on direct mail campaigns to educate over 7.6 million North Carolina households about absentee ballot procedures. Dore Decl. ¶¶ 11, 13. The RNC also set up four Victory Headquarters Field Offices in North Carolina and has approximately 16 paid staff working on voter education in the state. White Decl. ¶ 9. The Republican Committees prioritized their strategic activities in reliance on North Carolina's established voting laws. *See* Dore Decl. ¶¶ 14-15; White Decl. ¶¶ 11-12; Dollar Decl. ¶¶ 12-13; Clark Decl. ¶ 10. The BOE's recent modifications to those voting laws will largely negate the Republican Committees' previous efforts, require them to educate voters about the voting changes, and cause the Republican Committees to suffer enormous financial loss. *See* Dore Decl. ¶¶ 14-15; White Decl. ¶¶ 11-12; Dollar Decl. ¶¶ 12-13; Clark Decl. ¶ 10.

D. The Coordinated Litigation Effort To Subvert HB 1169 and Alter North Carolina's Election Procedures

The General Assembly's bipartisan action to combat the COVID-19 pandemic's impact on the November election was not enough for certain Democratic Party operatives, who saw in the COVID-19 pandemic a way to legislate through the courts. *E.g.,* Leland Decl., Ex. 19, Eric Holder: Here's How the Coronavirus Crisis Should Change U.S. Elections—For Good, TIME (Apr. 14, 2020) ("Coronavirus gives us an opportunity to revamp our electoral system . . ."). In North Carolina alone, Democratic Party committees and related organizations have filed seven lawsuits attacking various aspects of North Carolina's election code. Plaintiffs in many of these cases filed motions to preliminarily enjoin certain aspects of HB 1169 and the North Carolina election code.

The first North Carolina decision came in *Democracy North Carolina*, 2020 WL 4484063. Several organizations and individuals sued the BOE and moved for a preliminary injunction, claiming that numerous provisions of North Carolina's election code, including the Witness Requirement, Receipt Deadline, Postage Requirement, Assistance Ban, and Ballot Delivery Ban, violated federal constitutional and statutory law. *See id.* at *5–10. The President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives ("Legislative Defendants") intervened to defend the General Assembly's election laws, and the Republican Committees appeared as *amici*. *See id.* *3. On August 4, after a three-day evidentiary hearing and extensive argument, the district court issued a comprehensive 188-page opinion and order. *See generally id.* The court rejected nearly all of the claims, finding that plaintiffs could not show a likelihood of success on the merits. *See id.* *1, 64. For instance, the court rejected the challenge to the Witness Requirement because even elderly, high-risk voters could fill out a ballot in a short period of time and have the witness observe the process from a safe distance, thereby significantly reducing any risk of COVID-19 transmission. *Id.* at *24–33; *see also id.* at *52

(finding that the Ballot Delivery Ban was related to the legitimate purpose of "combating election fraud" and would likely be upheld). Moreover, the court found that even if certain procedures did "present an unconstitutional burden under the circumstances created by the COVID-19 pandemic," it was not the court's role to "undertake a wholesale revision of North Carolina's election laws," particularly so close to an election. *See id.* at *45 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006)).

Although the district court denied nearly all of the plaintiffs' claims, it did find that they were likely to succeed on two issues. First, the court found that one plaintiff (an elderly, blind nursing home resident) was likely to succeed on a Voting Rights Act claim challenging North Carolina's limitation on who could assist him with completing his ballot. *Id.* at *55, 61. Second, the court found that plaintiffs were likely to succeed in showing that North Carolina's lack of a notification and cure procedure for deficient absentee ballots violated procedural due process. *Id.* at *55. The court accordingly enjoined the Board "from allowing county boards of elections to reject a delivered absentee ballot without notice and an opportunity to be heard until" the Board could implement a uniform cure procedure. *Id.* at *64.

The BOE responded to the court's procedural due process ruling by issuing Numbered Memo 2020-19 (Leland Decl., Ex. 20), which (1) eliminated the requirement that county boards match the signature on the ballot to the voter's signature on file and (2) defined a cure procedures for deficient absentee ballots. *Id.* §§ 1, 2. A voter's failure to sign the voter certification or signing the certification in the wrong place could be cured through an affidavit. *Id.* § 2.1. Affidavits could not cure deficiencies related to the Witness Requirement, meaning the ballot would be spoiled and a new one issued to the voter. *Id.* Collectively, these procedures will be called the "Cure Process."

Notwithstanding the federal court's extensive ruling, which upheld the vast majority of the challenged provisions, as well as the Board's prompt action in implementing the Cure Process, the Democratic Party and related organizations remained undeterred. They continued to press forward with five lawsuits in North Carolina state court challenging many of the same provisions upheld in *Democracy North Carolina*, including one claiming that the Cure Process violated North Carolina's Constitution because it arbitrarily distinguished between voters.[13] All of those lawsuits were filed against the BOE, and the Legislative Defendants were granted intervention in each case. In all of those lawsuits except *Chambers*, Mr. Elias and the Perkins Coie law firm represented the plaintiffs against the BOE.

The second decision to address a motion to enjoin certain aspects of HB 1169 was *Chambers,* which challenged the Witness Requirement. On September 3, a three-judge panel[14] denied Plaintiffs' motion to preliminarily enjoin the Witness Requirement. *See* Leland Decl., Ex. 1, *Chambers*, Case No. 20-CVS-500124. After briefing with evidentiary submissions and an oral hearing, the panel held that there was not a substantial likelihood the plaintiffs would prevail on the merits. *Id*. at 6. Furthermore, it held that "the equities do not weigh in [plaintiffs'] favor" because of the proximity of the election, the tremendous costs that the plaintiffs' request would impose on the State, and the confusion it would cause voters. *Id.* at 7. Specifically, the panel determined that changes requested by plaintiffs "will create delays in mailing ballots for *all* North

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13 *See DSCC v. N.C. State Bd. of Elections*, No. 20-CVS-69947 (Sup. Ct. Wake Cnty. Sept. 8, 2020) (challenging Cure Process); *Alliance*, No. 20-CVS-8881 (Sup. Ct. Wake Cnty. Aug. 10, 2020) (challenging the Witness Requirement, Postage Requirement, Receipt Deadline, Application Assistance Ban, Ballot Delivery Ban, and Uniform Hours requirement; *Stringer v. North Carolina*, No. 20-CVS-5615 (Sup. Ct. Wake Cty. May 4, 2020) (challenges similar to those in the *Alliance* case); *Advance North Carolina. v. North Carolina*, No. 20-CVS-2965 (Sup. Ct. Wake Cnty. Mar. 4, 2020) (limitations on who may assist with completion and delivery of absentee ballots); *North Carolina Democratic Party v. North Carolina*, No. 19-CVS-14688 (Sup. Ct. Wake Cnty. Oct. 28, 2019) (Uniform Hours requirement).

14 Under North Carolina law, all challenges to the facial validity of North Carolina statutes must be heard by a three-judge panel in the Superior Court of Wake County. N.C.G.S. § 1A-1, 42.

Carolinians voting by absentee ballot in the 2020 general election and would likely lead to voter confusion as to the process for voting by absentee ballot." *Id.* (emphasis in original).

The Board of Elections then proceeded, pursuant to a statutory requirement, to mail absentee ballots to "more than 650,000" voters who had requested them. *See* Leland Decl., Ex. 21, *The November Election Season Has Officially Started, as North Carolina Begins Sending Out Mail Ballots*, The Washington Post (Sept. 4, 2020) (indicating that on Sept. 4, the North Carolina had already begun mailing out more than 650,000 absentee ballots to voters). As of September 26, 1,028,648 absentee ballots had been requested, and 221,588 completed ballots had been returned.[15]

Notwithstanding defeats in *Democracy North Carolina* and *Chambers*, plaintiffs in the remaining cases continued to press forward. The plaintiffs in *Alliance* filed a preliminary injunction motion on August 21, and submitted supporting papers on September 4. Opposition briefs were due on September 28, with a preliminary injunction hearing scheduled for October 2. During that time, the Legislative Defendants and State Defendants began deposing fact and expert witnesses.[16] The Republican Committees, who were awaiting a ruling on their intervention motion, also participated in those depositions.

E. The BOE's Consent Judgment with the *Alliance* Plaintiffs

During the time that the Legislative Defendants and Republican Committees were engaged in depositions, the State Defendants conducted secret settlement negotiations with the *Alliance* plaintiffs. Not until one of the plaintiffs' witnesses failed to show up for her deposition did the

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15 *See* https://www.ncsbe.gov/ for a current number of requested ballots; Leland Decl., Ex. 22, BOE Absentee Data.

16 The depositions were not completed. After the plaintiffs and the State Board defendants announced the deal, plaintiffs refused to allow any further witnesses to be deposed.

plaintiffs inform the Legislative Defendants and Republican Committees of the deal. Those negotiations resulted in the plaintiffs and BOE's agreeing to the Consent Judgment, which it submitted to the court for approval on September 22. Pursuant to the Consent Judgment, the plaintiffs agreed to drop their claims against the BOE in exchange for the BOE's implementing significant changes to North Carolina's election code for the November general election. A hearing on the joint Consent Judgment motion is scheduled for October 2. However, it appears that the BOE has deemed its new "Numbered Memos" to be immediately effective.

Under the deal, the BOE implemented changes to North Carolina's election code by revising Numbered Memo 2020-19 (which established the Cure Process) and issuing new memos to county boards. Revised Numbered Memo 2020-19 now (1) requires county boards to accept a ballot signature as long as it appears to have been made by the voter and (2) allows voters to cure a ballot that is deficient due to a lack of signature, problem with the voter's contact information, or problem with the witness's certification (for instance, the witness failed to sign the ballot) by submitting a cure affidavit. *See* Leland Decl., Ex. 23, Revised Numbered Memo 2020-19.

The Board also issued Numbered Memo 2020-22, which applies only to "remaining elections in 2020," and provides that absentee ballots are timely if "(1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m." Leland Decl., Ex. 24, Numbered Memo 2020-22. In addition to tripling the Receipt Deadline from the statutory requirement of three days after Election Day to nine days, the BOE eliminated the Postmark Requirement by providing that a ballot is considered "postmarked" if there is information in a tracking service showing that the ballot was "in the custody of USPS or the commercial carrier on or before Election." *Id.*

Finally, the Board issued Numbered Memo 2020-23, which affirms that absentee ballots cannot be left in an unmanned drop box, but then negates that restriction by stating that county boards cannot "disapprove a ballot solely because it is placed in a drop box." Leland Decl., Ex. 25, Numbered Memo 2020-23. Furthermore, the Board ignored North Carolina's strict statutory limits on who may deliver a completed absentee ballot by instructing county boards that they cannot "disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot." *Id.*

LEGAL STANDARD

A party seeking a temporary restraining order must establish a likelihood of success on the merits, irreparable harm without relief, that the balance of equities tips in plaintiff's favor, and that an injunction is in the public interest. *Wilson v. Thomas*, No. 5:14-CV-85-BO, 2014 WL 5307491, at *1 (E.D.N.C. Oct. 16, 2014); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. THE BOE'S CHANGES TO NORTH CAROLINA ABSENTEE BALLOT LAWS VIOLATE THE UNITED STATES CONSTITUTION

A. The Elections and Electors Clauses in the United States Constitution Require State Legislatures to Regulate Elections.

The Elections Clause of the United States Constitution, mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., art. I, § 4, cl. 1. Courts have long understood that to fulfill that obligation and to ensure that elections are "fair and honest" and conducted with "some sort of order, rather than chaos," state legislatures must enact "substantial regulation." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 604-05 (4th Cir. 2016) (same). Furthermore, the

Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const., art. II, § 1, cl. 2.

On June 11, 2020, the General Assembly fulfilled its constitutional obligations and passed HB 1169 by a strong bipartisan vote of 105-14 in the House and 37-12 in the Senate, and the bill was signed into law the next day. *See* Leland Decl., Ex. 14, HB 1169. HB 1169 made several changes to the election laws to address potential issues from COVID-19, including addressing some of the same absentee ballot regulations the BOE seeks to modify now. *See* p. 8 above.

The question of the time, place, and manner in which to conduct the election in November implicates many sensitive public policy issues that by their nature are more properly considered, balanced, and resolved by the collective judgment of the General Assembly than by the BOE. That is exactly what the General Assembly did. The BOE's Consent Judgment and Numbered Memos do not raise new issues that the General Assembly failed to consider, and it would not matter if they did. Before HB 1169 passed, the BOE had already proposed to the General Assembly reducing or eliminating the witness requirement for absentee ballots. Leland Decl., Ex. 12, State Bd. Mar. 26, 2020 Ltr. at 3 ("Reduce or eliminate the witness requirement"). Moreover, the General Assembly had the benefit of information about primary elections conducted during the pandemic and USPS's challenges. The General Assembly was also familiar with the recent North Carolina election tainted by "absentee ballot fraud" that needed to be held anew, along with the importance of banning ballot harvesting. *See* Leland Decl., Ex. 13, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019). Considering all this, the General Assembly made policy judgments about how to address each of those issues. Even though not every legislator got what he or she wanted, and even though the BOE may have recommended different solutions, HB 1169 reflects careful consideration of how

the pandemic will affect voting in North Carolina in 2020, was overwhelmingly adopted with a bipartisan majority, and under our Constitutional system is an appropriate resolution.[17]

Deference to state legislatures and their policy compromises is especially important this close to an election. The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207, 206 L. Ed. 2d 452 (2020) (*citing Purcell*, 549 U.S. 1); *Frank v. Walker*, 574 U.S. 929, 135 S.Ct. 7, 190 L. Ed. 2d 245 (2014); *Veasey v. Perry*, 574 U. S. ——, 135 S.Ct. 9, 190 L. Ed. 2d 283 (2014)). Indeed, on several occasions this summer, the Supreme Court has stayed lower-court preliminary injunctions that would have changed voting regulations in response to the pandemic just before the election. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 207 (2020) (staying injunction of Wisconsin election requirements including deadline for state's receipt of absentee ballots and emphasizing that "lower federal courts should ordinarily not alter the election rules on the eve of an election."); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (U.S. July 30, 2020) (staying injunction extending Idaho deadline for accepting ballot-initiative signatures and permitting digital collection of signatures); *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742, at *1 (U.S. Aug. 11, 2020) (staying injunction against Oregon initiative signature requirement); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049, at *1 (U.S. July 2, 2020) (staying injunction against absentee ballot witness requirement and other Alabama voting regulations).

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[17] *See* Leland Decl., Ex. 11, Jordan Wilkie, NC House Passes Bipartisan Election Bill To Fund COVID-19 Response, Carolina Public Press (May 29, 2020) ("Neither party got everything they wanted," but the "compromise bill" was "better for the people of North Carolina.").

B. The BOE Has Usurped the General Assembly's Authority.

The BOE does not have the authority to pass rules that plainly conflict with North Carolina's election code. In the Consent Judgment, the BOE relies on its "emergency powers" as the source of its authority for the changes. Leland Decl., Ex. 2, *Alliance*, No. 20-CVS-8881, Stipulation and Consent Judgment, at *10. But this effort to invoke emergency powers is misguided. The General Assembly considered substantial evidence about the pandemic and USPS's challenges and rejected essentially the same proposals that the BOE has now purported to adopt. In short, the General Assembly has already addressed whatever "emergency" the BOE is purporting to resolve with the backroom deal.

Moreover, the BOE's emergency powers are specifically limited. In exercising its authority under those powers to conduct an election during "a natural disaster," the General Assembly has provided that "the Executive Director ***shall*** avoid unnecessary conflict with the provisions of" the voting code. N.C.G.S. § 163-27.1 (emphasis added). Similarly, although N.C.G.S. § 163-22(a) provides that the BOE "shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable," that authority is also limited by the requirement that the rules and regulations "do not conflict" with the state's voting code. *Id*.

The Consent Judgment and Numbered Memos plainly modify several material components of the time, place, and manner statutes enacted by the General Assembly for absentee mail ballots. On these issues the Board is entitled to no deference under the Constitution, and if any deference was due, no amount of deference would salvage the Board's backroom deal, which illegally adopts several changes to the law that the General Assembly expressly rejected this summer.

Receipt deadline. The BOE's changes to the Receipt Deadline plainly conflict with the controlling statute. The statute enacted by the General Assembly requires that absentee ballots be

delivered by 5:00 p.m. on election day, or if they are mailed by the USPS, that they are postmarked by election day and received **no later *than three days after election day*** (by Nov. 6, 2020) by 5:00 p.m. N.C.G.S. § 163-231(b)(2). Flouting this directive, Numbered Memo 2020-22, purports to extend the deadline by six days: "An absentee ballot shall be counted as timely if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by ***nine days after the election***, which is Thursday, November 12, 2020 at 5:00 p.m." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 1.

Since the General Assembly explicitly and responsibly revisited the North Carolina Election Code to address concerns about COVID-19 and USPS challenges, any suggestion by the Board that this change was necessitated by those issues[18] would confirm its intent to usurp authority from the General Assembly. The Consent Order expresses concern that, due to the current mail processing rates by the USPS, completed ballots mailed on election day will not arrive in time to be counted three days later, as required by statute. *E.g.*, Leland Decl., Ex. 2, *Alliance*, No. 20-CVS-8881, Stipulation and Consent Judgment, at **7-10. However, it is wholly within each voter's control to avoid unnecessary delays before mailing a completed ballot. Indeed, voters have been instructed by USPS and the BOE, among others, to request and return ballots as early as possible within the more than 60-day window before the receipt deadline. Leland Decl., Ex.

[18] Plaintiffs' expert in the *Alliance* case testified that he was not aware that the Postal Service is currently experiencing any problems in North Carolina during the current absentee voting period. (Leland Decl., Ex. 26, Deposition of Kenneth R. Mayer at 80.) He also could not testify as to any instances where the Postal Service had failed to deliver an absentee ballot in North Carolina for insufficient postage, and was unaware of any North Carolinian who declined to vote because of confusion as to how much postage to affix to a ballot return envelope. *Id.* at 104-06. Mayer also acknowledged that it is the Postal Service's policy to deliver absentee ballots even if they are unstamped. *Id.* at 106. Finally, he had no reason to question statistics showing that in 2019 the Postal Service delivered an average of approximately 472 million mail pieces per delivery day, and that even if every registered voter in the United States voted by mail (about 155 million ballots), those ballots would represent only a small fraction of the total volume of mail. *Id.* at 106-07.

27, Plunkett Aff. at ¶ 28; *see also* N.C. Gen. Stat. § 163-227.10(a). If they wait until the last day to return their completed ballots, they may also return them in person. N.C.G.S. § 163-231(b)(1). But even if a voter does wait until the last permitted hour of election day to mail his or her ballot, USPS will be able to process mail ballots within the time parameters set by North Carolina voting statutes. First, in North Carolina, more than 95% of Presort First-Class Mail is delivered within 2 days, Plunkett Aff. at ¶ 17, and no First-Class Mail in the state has more than a three-day service standard, *id*. at ¶ 18. Second, USPS's ability to deliver mail in a timely fashion will not be impacted by an increased volume of mail ballots for several reasons. *Id*. at ¶¶ 33-35. Third, USPS has established procedures and processes for delivering election mail and has a plan for the upcoming election in North Carolina. *Id*. Thus, even for voters who irresponsibly procrastinate to request and mail their ballots, it is highly likely that USPS will deliver their ballots on time. *Id*. at ¶ 14.

Witness requirement. The BOE has also eviscerated the critical Witness Requirement. The General Assembly revised the voting regulations for the 2020 election to reduce the requirement that two individuals witness a voter's absentee ballot to a one-witness requirement. HB 1169 § 1.(a). The BOE's Numbered Memo 2020-19 goes further and would allow an absentee ballot for which the witness or assistant did not print his or her name or address, or sign the ballot, to be cured by a voter a certification. Leland Decl., Ex. 23, Revised Numbered Memo 2020-19 at 2. A voter who submits an absentee ballot without a witness will be sent a certification for ***the voter to sign***, and upon receipt of that certification (but no witness), BOE will count the ballot. When drafting HB 1169, the General Assembly rejected this very outcome when it rejected the BOE's proposal to eliminate the witness requirement. *See* Leland Decl., Ex. 28, State Bd. Apr. 22, 2020 Ltr. at 3; Leland Decl., Ex. 12, State Bd. Mar. 26, 2020 Ltr. at 3.

Again, it would be cynical for the Board to argue that COVID-19 necessitates eliminating or neutering this requirement. The General Assembly expressly considered—and indeed made—changes to the Witness Requirement to address the COVID-19 pandemic. The BOE's backroom deal to eliminate the requirement entirely is an *ultra vires* power grab that offends the Constitution and that the pandemic does not require. As explained (pp. 10-12 above), two courts have already sustained the witness requirement against pandemic-related challenges.

Postmark requirement. The BOE's modification to the postmark requirement also plainly contradicts the controlling statute. With respect to absentee ballots that are mailed by USPS and received within three days of the election, the General Statutes require that the ballots be "postmarked" on or before the election day by 5:00 p.m. N.C.G.S. § 163-231(b)(2). However, for remaining elections in 2020, which could include run-offs as well as the November 3 election, the BOE has unilaterally declared that a ballot "shall be considered postmarked by Election Day if it has a postmark affixed to it *or if there is information in BallotTrax, or another tracking service* offered by the USPS or a commercial carrier, *indicating* that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 2 (emphasis added). This rewrites the plain meaning of the statute. A "postmark" is "[a]n official mark put by the post office on an item of mail to cancel the stamp and to indicate the place and date of sending or receipt." Postmark, Black's Law Dictionary (11th ed. 2019).[19] The General Assembly has also refused to enact similar changes. Another bill, HB 1184, included a similar proposal, among other items on the Democrats' "wish list,"[20] and was not enacted.[21] HB

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19 *See* also USPS processing guidelines, https://about.usps.com/handbooks/po408/ch1_003.htm.

20 Leland Decl., Ex 11, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

21 *Id*.

1184 would have similarly amended the voting statute such that "absentee ballots that are received without a postmark through the United States Postal Service mail system shall be deemed properly cast and accepted and counted up to three days after the general election." HB 1184 § 3.6. Once again, this intentionally overrides the General Assembly.

Moreover, the Board's rewrite is as porous as Swiss Cheese: What "information" is sufficient to "indicate" that a ballot was in the "custody" of the USPS on Election Day? What other "tracking services" besides BallotTrax has the Board decided to look at to deem a ballot in USPS custody. The Board doesn't say. Coupled with the extended receipt deadline, it is not difficult to see where this is going: under the BOE's regime, election officials will be debating what constitutes sufficient information to indicate that a ballot was in custody of the USPS until mid-November and beyond. Postmarks will be the 2020 version of hanging chads.

Ballot delivery and assistance bans. The BOE's modification to the ballot delivery ban also plainly contradicts the voting statutes. Completed mail ballots may be returned in person by the voter, the voter's near relative or verifiable legal guardian, or by mail using USPS or a commercial courier. N.C.G.S. §§ 163-229(b); 163-231(a)-(b); HB 1169 §§ 1.(a), 2.(a). It is a class I felony for any other person to take possession of an absentee ballot of another voter for deliver or return to a county board of elections. N.C.G.S. § 163-223.6(a)(5). With limited exceptions, North Carolina law also prohibits anyone except the voter's near relative or legal guardian from assisting a voter with the completion and submission of an absentee ballot. N.C.G.S. § 163-226.3. The BOE would effectively neuter these protections. Numbered Memo 2020-23 provides that "[a] county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot" and that "a county board may not disapprove a ballot solely because it is placed in a drop box." Leland Decl., Ex. 25, Numbered Memo 2020-23 at 2-

3. This is not a change necessitated by COVID-19. Stamps are widely available, *see* Leland Decl., Ex. 27, Plunkett Aff. ¶¶ 32-34, and there is no reason voters could not mail their ballots.

One need look no further than the Dowless scheme in District 9 to see the justification for the harvesting ban and not accepting ballots tainted by harvesting. That scheme took years to uncover and led to the invalidation of a congressional election. The BOE's deal opens the door to similar schemes to fraudulently "harvest" ballots from vulnerable communities. The Numbered Memos do not merely enforce or interpret the law, they modify it in significant, material, and unnecessary ways. And the BOE lacks the authority to do so.

C. The Fourteenth Amendment to the U.S. Constitution Prohibits the BOE's Actions, Which Dilute Valid Votes.

Not only has the BOE usurped the General Assembly's legislative power to enact North Carolina's elections laws, but it has done so in a way that violates the fundamental right to vote guaranteed by the Fourteenth Amendment to the U.S. Constitution. If implemented, the BOE's Numbered Memos would nullify key safeguards against absentee ballot voting fraud—including the receipt deadline, witness requirement, postmark requirement, and ballot harvesting ban. In the process, the Numbered Memos would increase the risk of voter fraud and dilute the weight of each citizen's vote in North Carolina. The BOE's backroom deal violates the fundamental right for each citizen's vote to be counted on an equal basis and should be invalidated.

The Fourteenth Amendment to the U.S. Constitution protects the "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 77 U.S. 533, 554 (1964). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (citation omitted); *see also Dunn v.*

Blumstein, 405 U.S. 330, 336 (1972) ("[A] a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (citation omitted).

That is precisely what the BOE's Numbered Memos do here. As shown above, see pages 18-23, the Numbered Memos would nullify four provisions of North Carolina's voting laws: (1) the receipt deadline; (2) the witness requirement for absentee ballots; (3) the postmark requirement; and (4) the ballot harvesting ban. The nullification of each of these requirements would increase the risk of voter fraud in the upcoming general election and all but invite a repeat of the McCrae Dowless fraud that North Carolina experienced in 2018.

Witness Requirement. The witness requirement is an impediment to voter fraud. As the federal court noted in *Democracy North Carolina*, "the One-Witness Requirement plays a key role in preventing voter fraud and maintaining the integrity of elections." *Democracy N.C.*, 2020 WL 4484063, at *35. "[M]uch like an in-person voter is required to state their name and address upon presenting themselves at an in-person polling place; the act of identification, as witnessed by the poll worker, acts as the same deterrent from committing fraud." *Id.* Furthermore, even if a fraudster were determined to violate North Carolina's election laws, the witness requirement would act as a deterrent because it would require the fraudster to enlist a confederate who is also willing to break the law and risk prosecution. *See id.* at *34 (describing the Dowless election fraud case).

Postmark Requirement and Receipt Deadline. The postmark requirement and receipt deadline work in tandem to ensure that North Carolina counts only timely submitted absentee

ballots—rather than absentee ballots that are voted after election day. Far from adhering to North Carolina's statutory requirement that absentee ballots be "postmarked" on or before the election day by 5:00 p.m, *see* N.C.G.S. § 163-231(b)(2), Numbered Memo 2020-22 would permit absentee ballots to be counted so long as "there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 2. Relying on a non-governmental tracking service as a substitute for the postmark requirement would increase the risk of absentee ballots being mailed (and ultimately counted) after election day. *See* Leland Decl., Ex. 29, Ellie Kaufman, "Postmarks Come Under Scrutiny as States Prepare for Mail-In Voting," CNN (Aug. 11, 2020) ("Many states add a postmark requirement to mail-in ballots to ensure that the ballots were sent before or on Election Day, trying to prevent votes submitted after Election Day from being counted.").

Furthermore, the receipt deadline and postmark requirement are an integral part of North Carolina's ability to maintain an orderly election and timely count absentee votes before their canvas deadlines. North Carolina requires the county boards of election to complete their vote canvass by "11:00 A.M. on the tenth day after every election," with the deadline extended to a "reasonable time thereafter," in the event that election officials are unable to complete a vote count despite due diligence. N.C.G.S. § 163-182.5(b). With an enormous increase in absentee ballots expected in the 2020 election, county boards will have an ample challenge to complete their canvass in the six days between the final day for receipt of absentee ballots (three days after the election) and the canvass. Leland Decl., Ex. 30, Summa Decl. ¶ 19. Even if the canvass deadline is extended, a second deadline looms: three weeks after the general election. By that date, the BOE is required "to complete the canvass of votes cast in all ballot items within the jurisdiction of

the State Board of Elections and to authenticate the count in every ballot item in the county." N.C.G.S. § 163-182.5(c). If the State is unable to meet that deadline, then the "State Board may adjourn for not more than 10 days to secure the missing abstracts." *Id*. The ultimate deadline is the federally-imposed deadline of December 14, when the State must certify its electors or else lose its voice in the Electoral College. 3 U.S.C. § 7."). Changing such a tightly structured election process risks undermining its integrity.

Ballot Harvesting Ban. Statutes such as N.C.G.S. § 163-226.3(a)(6) provide further deterrence for those who would interfere with validity of election results through ballot harvesting, because they criminalize absentee ballot collection and delivery on the part of anyone who is not a voter's near relative or verifiable legal guardian. As the BOE itself successfully argued before a federal court just a few months ago, the ballot harvesting ban is an integral component of North Carolina's attempt to deter voting fraud: "North Carolina's restrictions on absentee ballot assistance . . . reduce the risk of fraud and abuse in absentee voting. . ." *Democracy North Carolina*, No. 1:20-cv-00457-WO-JLW, State Opp. to Mot. for Preliminary Injunction, Dkt. 50, at *22 (M.D.N.C. June 26, 2020).

To see the importance of these requirements, the Court need look no further than the 2018 fraud perpetrated by McCrae Dowless, which involved a ballot harvesting scheme that resulted in the invalidation of the election results in North Carolina's ninth congressional district. *Democracy North Carolina*, 2020 WL 4484063, at *34. Dowless and his co-conspirators collected absentee ballot request forms and absentee ballots, falsified absentee ballot witness certifications, discarded ballots from voters suspected of supporting Dowless's disfavored candidate, and submitted forged absentee ballots—all for the purpose of "get[ting] as many Republican votes in before election day as possible." *See id*. The witness requirement and ballot harvesting ban proved to be impediments

that Dowless and his associates attempted to evade by staggering the timing of their submission of the ballots, limiting the number of times a witness's signature appeared on ballots, and keeping the pen colors and dates consistent with those of the absentee voter. Leland Decl., Ex. 13, BOE Order (Mar. 13, 2019) ¶¶ 52–57, 65; *see also* Leland Decl., Ex. 31, Lockerbie Aff. ¶ ¶18, 21 (noting the role that the Witness Requirement played in the state's ability to detect and prosecute the Dowless scheme). Moreover, the Witness Requirement was pivotal to discovery and prosecution of the scheme. *See* Lockerbie Aff. ¶¶ 18, 21. Permitting the BOE's Numbered Memos to take effect and eliminate the witness requirement and ballot harvesting ban would leave North Carolina without the ability to enforce the very requirements that interfered with Dowless's plan, enabled the BOE to discover and investigate the scheme, and ultimately resulted in a new election with valid results.

The General Assembly enacted its absentee voting laws out of concern for these very issues, and the BOE cannot rely on a state interest to defend the constitutionality of its actions for that reason. When reviewing constitutional challenges to election laws under the Fourteenth Amendment, the *Anderson-Burdick* balancing test requires courts to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests *put forward by the State* as justifications for the burden imposed by its rule . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation marks omitted and emphasis added). Here, the BOE is acting *against* the interests of the State. The General Assembly acted responsibly in responding to the COVID-19 pandemic. The BOE would now override the General Assembly's decision and implement policies the General Assembly considered but declined to adopt, while eliminating others that retained to preserve the integrity of the electoral process. Permitting the BOE to usurp the General

Assembly's authority would violate the fundamental right of North Carolinians to have their votes counted on an equal basis without dilution and undermine their confidence in a fair election.

D. The Deal Creates Two Absentee Voting Regimes in Violation of the Equal Protection Clause to the U.S. Constitution.

If the State Board were to have its way, the nullification of the witness requirement, postage requirement, and ballot harvesting ban would come into effect weeks into the absentee voting process—resulting in the differential treatment of voters who submitted their ballots before and after the State Board's sought-after changes. Such an arbitrary system would violate the Equal Protection Clause's guarantee that "each qualified voter be given an equal opportunity to participate in that election." *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1968).

The Equal Protection Clause of the Fourteenth Amendment requires that North Carolina treat its voters equally to ensure that they are accorded their "right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336. Under the Fourteenth Amendment, the fundamental right to vote "is protected in more than the initial allocation of the franchise." *Bush*, 531 U.S. at 530. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 530.

The State Board's actions would violate this guarantee by creating a two-tiered absentee ballot voting process, according to which voters who submitted their ballots before the Numbered Memos' release were required to comply with North Carolina law while those voters who submit their ballots afterwards are not. Absentee voting in North Carolina has been well underway since September 4, *see* N.C. Gen. Stat. § 163-227.10(a). Already at least 239,705 absentee ballots,

including that of Plaintiff Patsy Wise, have been returned in compliance with the full range of requirements set forth in HB 1169. Leland Decl., Ex. 22, BOE Absentee Data. Now, weeks into absentee voting, the State Board has issued multiple Numbered Memos that would nullify certain absentee voting requirements entirely, penalizing absentee voters, like Ms. Wise, who have already submitted their ballots in compliance with those requirements. The State Board has offered no legitimate rationale for this policy change, which comes after the State Board has spent months successfully defending the importance of the very absentee voting provisions that it would now nullify. Such an arbitrary, two-tiered absentee voting system constitutes a clear violation of the Fourteenth Amendment's guarantee of equal protection.

II. EQUITY WEIGHS IN FAVOR OF A TEMPORARY RESTRAINING ORDER

The Numbered Memos at issue are already posted on the BOE's website and are purportedly already in effect. A voter relying on the cure process can forego the witness requirement, expecting to cure that ballot defect by submitting an unwitnessed certification. Voters may rely on the Memos to entrust their ballots to unscrupulous ballot harvesters. As election day draws closer, the postmark and ballot receipt deadlines will become critical, and perhaps decisive in some of the elections. The situation is urgent. The changes will cause confusion among many voters, including the Republican Committees' members, and even among election administrators. This will create "incentiv[e]s to remain way from the polls." *Purcell*, 549 U.S. at 4-5. And as shown (p. 9 above), the changes will undermine investments previously made by the Republican Committees.

The remaining equities and public interest also weigh in Plaintiffs' favor. *First*, the General Assembly has already appropriately weighed concerns related to the pandemic and postal service, and its decision deserves deference. *Second*, as shown, the provisions the deal would override are directed at protecting the integrity of the election process. The public interest strongly

favors safeguarding "public confidence in the integrity of the electoral process." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008). *Third*, the State has a compelling interest in promoting the "orderly administration" of elections through laws such as the postmark requirement and receipt deadline. *See id*. at 195. The equities weigh strongly in favor of injunctive relief.

CONCLUSION

For these reasons, Plaintiffs respectfully urge this Court to grant their motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2020, I electronically filed the foregoing document using the court's CM/ECF system and that I have electronically mailed the documents to all non-CM/ECF participants.

/s/ *R. Scott Tobin*
R. Scott Tobin

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Civil Action No. 4:20-CV-182

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Elections Clause of the Constitution—Article I, Section 4, clause 1—says that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. 1, §4, cl. 1 (emphasis added). The Constitution thus entrusts the power to regulate federal elections in the

first instance to the branch of state government that is closest to the people. In North Carolina that is the General Assembly. The aim of this assignment of authority, as John Jay explained to the New York ratification convention, is to ensure that the rules governing federal elections are determined by "the will of the people." 2 *Debates on the Federal Constitution* 327 (J. Elliot 2d ed. 1836).

2. The North Carolina Board of Elections is not the "Legislature," and it is not Congress, yet the Board released three Memoranda, dated September 22, 2020, to set new "Times" and new "Manners" for elections in North Carolina. These Memoranda effectively gut the Witness Requirement, set by the General Assembly in the Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a); extend the Receipt Deadline for ballots to *nine days* after Election Day, undoing the deadline set by the General Assembly in N.C. GEN. STAT. § 163-231(b)(2)(b); water down the Election Day postmark requirement, also set by the General Assembly in N.C. GEN. STAT. § 163-231(b)(2)(b); and revise the procedures for preventing ballot harvesting by making it easier to drop off ballots illegally. By usurping the General Assembly's constitutional prerogative to "[p]rescribe" the "Times, Places and Manners" of the federal election, the Board is violating the Elections Clause.

3. The Board's ad hoc Memoranda changing the rules regulating the ongoing federal election also violate the Equal Protection Clause. As of filing 239,705 North Carolinians have cast their ballots—including 129,464 Democrats and 39,094 Republicans—and 1,028,648 have requested absentee ballots—including 504,556 Democrats and 185,393 Republicans—the vast majority *before* the Board arbitrarily changed the rules. Absentee Data, North Carolina State Board of Elections (Sept. 26, 2020), *available at* https://bit.ly/33SKzAw. The Board is thus administering the election in an arbitrary and nonuniform manner that inhibits voters who have *already* voted

under the previous rules from "participat[ing] in" the election "on an equal basis with other citizens in" North Carolina. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Bush v. Gore*, 531 U.S. 98, 105 (2000)). And the Board's Memoranda allow otherwise unlawful votes to be counted, thereby deliberately diluting and debasing lawful votes. These are clear violations of the Equal Protection Clause of the Fourteenth Amendment.

4. Plaintiffs seek appropriate declaratory and injunctive relief preventing these imminent, if not already ongoing, violations of law.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 18 U.S.C.§§ 1331, 1343, 1357 and 42 U.S.C. § 1983 because this action arises under the Constitution of the United States. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357 and 42 U.S.C. § 1983.

6. Venue is appropriate in this district under 28 U.S.C. § 1391(b) and under Local Rule 40.1(c)(1) because Plaintiff Bobby Heath is a resident of Pitt County in the Eastern District's Eastern Division, Plaintiff Whitley is a resident of Nash County and Plaintiff Swain is a resident of Wake County, both of which are in the Eastern District's Western Division, and Defendants' official offices are in Wake County, which is in the Eastern District's Western Division.

PARTIES

7. Plaintiff Timothy K. Moore is the Speaker of the North Carolina House of Representatives. He represents the 111th State House District. As the leader of the North Carolina House of Representatives, he represents the institutional interests of that body in this case. He appears in his official capacity.

8. Plaintiff Philip E. Berger is the President Pro Tempore of the North Carolina Senate. He represents the State's 30th Senate District. He has taken an oath to support and defend

the Constitution of the United States and the Constitution of North Carolina. As the leader of the North Carolina Senate, he represents the institutional interests of that body in this case. He appears in his official capacity.

9. Plaintiff Bobby Heath is a resident of Pitt County, North Carolina. He has been a registered voter in North Carolina since March 1980 and has voted in virtually every election since that time. Mr. Heath voted absentee by mail in the November 2020 general election under the rules requiring a single witness for his absentee ballot. Mr. Heath returned his absentee ballot by mail and according to the State Board of Elections' website that ballot was accepted on September 21, 2020.

10. Plaintiff Maxine Whitley is a resident of Nash County, North Carolina. She has been a registered voter in North Carolina since October 1964 and has voted in virtually every election since that time. Mrs. Whitley voted absentee by mail in the November 2020 general election under the rules requiring a single witness for her absentee ballot. Mrs. Whitley returned her ballot by mail and according to the State Board of Election's website that ballot was accepted on September 17, 2020.

11. Plaintiff Alan Swain is a resident of Wake County, North Carolina and is running as a Republican candidate to represent the State's 2nd Congressional District.

12. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections, which is the agency that is charged with administration of North Carolina's election laws and with the "general supervision over the primaries and elections in the State." N.C. GEN. STAT. § 163-22(a). He is named in his official capacity.

13. Defendant Stella Anderson is a member of the North Carolina State Board of Elections. She is named in her official capacity.

14. Defendant Jeff Carmon, III, is a member of the North Carolina State Board of Elections. He is named in her official capacity.

15. Defendant Karen Brinson Bell is the Executive Director of the North Carolina State Board of Elections. She is named in her official capacity.[1]

BACKGROUND

The General Assembly Established the Rules for the Election

16. Article I, Section 4, clause 1 of the U.S. Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. 1, § 4, cl. 1.

17. The Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id*. The Elections Clause thus does not grant the power to regulate elections to states, but only to the state's legislative branch.

18. Article II, Section 1 of the North Carolina State Constitution creates the North Carolina "Legislature" by vesting the "legislative power" exclusively in "the General Assembly, which shall consist of a Senate and a House of Representatives." *See also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). As the "the legislative branch," the General Assembly "enacts laws

[1] The North Carolina State Board of Elections is generally five members. Two members resigned on September 23, 2020, alleging they had not been properly advised of the consequences of the Board's policy changes as reflected in the Memoranda. *See 'Blindsided': GOP Elections Board Members Resign Over Absentee Ballot Settlement*, WSOCTV.COM (Sept. 24, 2020), https://www.wsoctv.com/news/local/2-gop-members-nc-state-board-elections-resign-report-says/O4OKQMNVWNEEBLQMKGZLGMNXOQ; *see also* David Black Resignation Letter (Sept. 23, 2020) (attached hereto as Ex. 6); Ken Raymond Resignation Letter (Sept. 23, 2020) (attached hereto as Ex. 7).

that protect or promote the health, morals, order, safety, and general welfare of society." *Id*. (internal quotation marks omitted).

19. As North Carolina's "Legislature," the General Assembly is tasked with regulating federal elections in North Carolina. U.S. CONST. art. 1, § 4, cl. 1. Accordingly, the General Assembly has exercised its federal constitutional authority to establish rules governing the manner of federal elections in North Carolina and many options for North Carolinians to exercise their right to vote.

20. Voters may cast their ballots in person at their assigned polling place on Election Day, which this year is November 3, 2020.

21. Voters who are "able to travel to the voting place, but because of age or physical disability and physical barriers encountered at the voting place [are] unable to enter the voting enclosure to vote in person without physical assistance . . . shall be allowed to vote either in [their] vehicle[s] . . . or in the immediate proximity of the voting place." N.C. GEN. STAT. § 163-166.9(a). This is commonly known as curbside voting.

22. Voters can vote early. North Carolina has established a 17-day early voting period beginning the third Thursday before the election through the last Saturday before the election at any early voting site in their county. N.C. GEN. STAT. §§ 163-227.2, 163-227.6. This means early voting starts this year on October 15, 2020. To ensure access, the same curbside voting accommodations are available at early voting sites. *See* Vote Early In-Person, N.C. STATE BD. OF ELECTIONS, https://bit.ly/3082mTf (last accessed Sept. 26, 2020).

23. Further, voters can vote by absentee ballot either early or on Election Day and without any special circumstance or reason necessary. See N.C. GEN. STAT. §§ 163-226, 163-230.2, 163-231.Voters can request an absentee ballot. But so too can the voter's near relative,

verifiable legal guardian, or member of a multipartisan team trained and authorized by the county board of elections on the voter's behalf. N.C. GEN. STAT. § 163-230.2.

24. To return a completed absentee ballot, a voter must have it witnessed and then mail or deliver the ballot in person, or have it delivered by commercial carrier. In addition, the voter's near relative or verifiable legal guardian can also return the ballots in person. N.C. GEN. STAT. § 163-231. But other than the voter's near relative or verifiable legal guardian, the General Assembly has criminally prohibited any other person from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5).

25. In general, absentee ballots must be returned to the local county board of elections by either (a) 5:00 p.m. on Election Day or (b) if postmarked by Election Day, the absentee ballots must be received "no later than three days after the election by 5:00 p.m." N.C. GEN STAT. § 163-231(b)(2)(b). This is the Receipt Deadline.

26. In short, the General Assembly has enacted numerous means for North Carolinians to vote and provided clear rules to regulate those means.

The General Assembly Revises Election Laws in the Bipartisan Elections Act of 2020

27. The General Assembly has also ensured that North Carolina's election laws have been updated to respond to the issues presented by the ongoing COVID-19 pandemic.

28. Governor Cooper declared a state of emergency on March 10, 2020 due to the COVID-19 pandemic. North Carolina elections officials soon understood that it may be appropriate to adjust the State's voting laws to account for the pandemic.

29. North Carolina State Board of Elections Executive Director Karen Brinson Bell submitted a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" on March 26, 2020.

30. In her letter, Director Bell requested that, among other things, the General Assembly "[r]educe or eliminate the witness requirement." Director Bell explained that such action was recommended to "prevent the spread of COVID-19." She further argued that "[e]liminating the witness requirement altogether is another option." N.C. State Board of Elections, *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3 (March 26, 2020), https://bit.ly/369EBOO (attached hereto as Ex. 4).

31. On June 11, 2020, the General Assembly passed bipartisan legislation adjusting the voting rules for the November Election by an overwhelming 142–26 margin. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Governor Cooper signed the duly passed bill into law the next day.

32. The Bipartisan Elections Act made a number of adjustments to North Carolina's election laws, including some of which Director Bell requested. The Act expands the pool of authorized poll workers to include county residents beyond a particular precinct, 2020 N.C. Sess. Laws 2020-17 § 1.(b); allows absentee ballots to be requested online, by fax, or by email, *id.* §§ 2.(a), 7.(a); directs the Board to develop guidelines for assisting registered voters in nursing homes and hospitals, *id.* § 2.(b); gives additional time for county boards to canvass absentee ballots, *id.* § 4; and provides over $27 million in funding for election administration, *id.* § 11.

33. In the Bipartisan Elections Act, the General Assembly also changed the Witness Requirement for absentee ballots. Normally under North Carolina law, absentee ballots require two qualified witnesses. *See* N.C. GEN. STAT. § 163-231.

34. But for the 2020 Election, the Bipartisan Elections Act provides that an "absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of *at least one person* who is at least 18 years of age and is not

disqualified by G.S. 163–226.3(a)(4) or G.S. 163–237(c).” *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added).

35. The one absentee ballot witness is still required to sign “the application and certificate as a witness” and print their “name and address” on the absentee ballot’s return envelope. *Id.*

36. The Bipartisan Elections Act did not accept Director Bell’s recommendation to “[e]liminat[e] the witness requirement altogether.” *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3.

37. The Bipartisan Elections Act also did not change the Receipt Deadline for absentee ballots, which remains set by statute as three days after the election by 5:00 p.m.

38. The Bipartisan Elections Act did not alter the prohibition on “any person” “tak[ing] into that person’s possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter.” N.C. GEN. STAT. § 163-226.3(a)(5). This remains clearly illegal as a matter of North Carolina law.

Director Bell and the Board Attempted to Assert Emergency Powers to Change the Election Laws

39. Director Bell has previously maintained that she is authorized to issue emergency orders to conduct an election where the normal schedule is disrupted “pursuant to [her] authority under G.S. § 163-27.1 and 08 NCAC 01.0106.” N.C. State Bd. of Elections, Numbered Memo 2020-14 at 1 (July 23, 2020), https://bit.ly/2EyXPlt. As relevant here, N.C. GEN. STAT. § 163-27.1 states that the Director “may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by” either “(1) [a] natural disaster” or “(2) [e]xtremely inclement weather.”

40. N.C. ADMIN. CODE 1.0106 explains that, for the purposes of § 163-27.1, a "natural disaster or extremely inclement weather include a . . . catastrophe arising from natural causes resulted [sic] in a disaster declaration by the President of the United States or the Governor."

41. Director Bell does not have sweeping authority to revise the North Carolina's elections statutes for the 2020 Election under the "natural disaster" provision.

42. The North Carolina Rules Review Commission unanimously rejected—by a vote of 9–0, see Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/308WSHW (attached hereto as Ex. 8)—the Board's proposed changes to N.C. Admin Code 1.0106 that would have clarified that

> "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident that makes it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting place or that creates a significant risk of physical harm to persons in the voting place, or that would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

Proposed Amendments to 08 N.C. ADMIN. CODE 01.0106 (Mar. 19, 2020), https://bit.ly/3082lyO.

43. In declining to approve the changes to the rule, the Rules Review Commission explained that the Board "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. Rules Review Commission Meeting Minutes at 4.

44. Accordingly, Director Bell and the Board do not have any delegated authority to rewrite North Carolina's election laws.

The Board Agreed with Private Litigants to Usurp North Carolina's Election Statutes

45. On August 10, 2020, nearly two months after the General Assembly's enactment of the Bipartisan Elections Act, the North Carolina Alliance for Retired Americans, a social welfare organization comprised of retirees from public and private unions, community organizations, and individual activists, together with seven individual North Carolina voters filed

suit in the Wake County Superior Court. *See North Carolina Alliance for Retired Americans, et al. v. North Carolina State Board of Elections* ("*Alliance*"), No. 20-CVS-8881 (Wake Cnty. Super. Ct.).

46. The *Alliance* plaintiffs named as a defendant one of the named Defendants in this action, Board Chair, Damon Circosta.

47. The *Alliance* plaintiffs sought injunctive relief, seeking numerous alterations to North Carolina's election statutes.

48. Among their requested relief, *Alliance* plaintiffs sought to "[s]uspend the Witness Requirement for single-person or single-adult households." Pls.' Compl. at 4, *Alliance*, No. 20-CVS-8881 (Wake Cnty. Super Ct. Aug. 10, 2020).

49. *Alliance* plaintiffs further requested an extension of the Receipt Deadline to "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day." *Id.*

50. *Alliance* plaintiffs also sought to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot. *Id.* at 39.

51. Legislative Plaintiffs Moore and Berger successfully intervened to defend the duly-enacted election regulations, as it is their absolute right to do under State law.

52. But before the state court had an opportunity to decide *Alliance* plaintiffs' motion for a preliminary injunction, the Board and the *Alliance* plaintiffs came to terms on a proposed consent judgment. Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment, *Alliance*, No. 20-CVS-8881 (Wake Cnty. Super. Ct. Sept. 22, 2020) (attached hereto as Ex. 1).

53. The Board released three Numbered Memoranda, at the same time as announcing the consent judgment.[2] Each Memorandum undoes validly enacted statutes passed by the General Assembly's exclusive prerogative to regulate federal elections. Each Memorandum is dated September 22, 2020.

54. Numbered Memo 2020-19 "directs the procedure county boards must use to address deficiencies in absentee ballots." Originally released August 21, 2020, the Board revised this Memo in a manner that eviscerates the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. N.C. State Bd. of Elections, Numbered Memo 2020-19 at 1 (August 21, 2020, revised Sept. 22, 2020), https://bit.ly/333yE3H (original version attached hereto as Ex. 3; revised version attached hereto as Ex. 1 at 32–37).

55. If a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the Board will allow the absentee voter to "cure" the deficiency. A voter cures a Witness Requirement deficiency through a "certification." *Id.* at 2.

56. The Board's "certification" is simply a form sent to the voter by the county board. And the voter can return the form to the county board at anytime until 5:00 p.m., November 12, 2020 and may do so via fax, email, in person, or by mail or commercial carrier. *Id.* at 3–4.

57. For a missing witness, the "certification" does not require the voter to resubmit a ballot in accordance with the Witness Requirement mandated by Section 1.(a) of the Bipartisan

[2] Numbered Memo 2020-19 is available on the Board's Numbered Memo page. *See* Numbered Memos, N.C. STATE BD. OF ELECTIONS, https://bit.ly/367Ffw8 (last accessed Sept. 26, 2020). But Numbered Memos 2020-22 and 2020-23 for some reason are not available. These Memoranda are dated September 22, 2020 and are publicly available through a link to the Board's joint motion in the Board's press release announcing the motion. *See* N.C. State Bd. of Elections, *State Board Updates Cure Process to Ensure More Lawful Votes Count* (Sept. 22, 2020) (attached hereto as Ex. 2) (linking to the Board's joint motion at https://bit.ly/2S5qBNr). Numbered Memo 2020-19 also cross references Numbered Memo 2020-22. *See* Numbered Memo 2020-19 at 4.

Elections Act. Instead, the "certification" lets the voter skip the Witness Requirement altogether. *Id.*

58. All a voter must do is sign and affirm the following affidavit:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

59. Thus, the Board through Numbered Memo 2020-19's "certification" allows absentee voters to be their own witness and vitiates the Witness Requirement. This is directly contrary to clear text of the Bipartisan Elections Act. Notably, in federal litigation challenging the Witness Requirement, Director Bell testified under oath that an absentee ballot with "no witness signature" could not be cured and therefore elections officials would have to "spoil that particular ballot" and require the voter to vote a new one. Evidentiary Hearing Tr. at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. July 21, 2020) (attached hereto as Ex. 5).

60. Director Bell and the Board sought to "[e]liminate" the Witness Requirement earlier this year legislatively. The General Assembly affirmatively declined. Yet the Board has attempted to accomplish what it could not do legislatively via an administrative memo.

61. Numbered Memo 2020-19, together with Number Memo 2020-22, alters the Receipt Deadline in violation of a duly enacted provision of the North Carolina General Statutes. *See* N.C. GEN. STAT. § 163-231(b)(2)(b).

62. Numbered Memo 2020-19 states that a ballot is not late (1) if it is received by 5:00 p.m. on Election Day or (2) "if postmarked on or before Election Day" and "received by 5 p.m. on Thursday, November 12, 2020." Numbered Memo 2020-19 at 4.

63. Election Day is November 3, 2020. Under the Receipt Deadline enacted by the General Assembly, a ballot must be received by November 6 at 5:00 p.m.—in other words within three days of Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b).

64. The Board, through Numbered Memo 2020-19, completely ignores that strict statutory limit and extends the Receipt Deadline to *nine days*—tripling the amount of time for absentee ballots to arrive.

65. Numbered Memo 2020-22 confirms this change in the Receipt Deadline and the Memo on its face points out that it directly contradicts N.C. GEN. STAT. § 163-231(b)(2)(b). In Footnote 1, the Memo invites the North Carolinian voter to compare the Board's new Receipt Deadline of nine days with the now-made-defunct statutory deadline of "three days after the election." The Board has transparently usurped the authority of the General Assembly by overruling the statutory deadline.

66. Numbered Memo 2020-19 and Numbered Memo 2020-22 by overruling a clear statutory deadline have transgressed the General Assembly's sole prerogative to regulate federal elections pursuant to the Elections Clause.

67. Numbered Memo 2020-22 also expands the category of ballots eligible to be counted if received after election day. By statute, such ballots must be "postmarked" by the U.S. Postal Service on or before Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b). Under Numbered Memo 2020-22, however, such ballots may be accepted in certain circumstances if not

postmarked by the Postal Service or not sent by through the Postal Service at all but rather by commercial carrier. *See* Numbered Memo 2020-22 at 1–2 (attached hereto as Ex. 1 at 29–30).

68. Numbered Memo 2020-23 clarifies the procedures for local county officials to confirm that ballots are delivered lawfully. For instance, the Numbered Memo sets out that county officials must confirm with an individual that is dropping off ballots that the individual is either the voter, the voter's near relative, or the voter's legal guardian. But even if the individual is not in one of the three lawful categories of those that can drop off a voter's ballot, the Numbered Memo instructs that "Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot." This undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots. N.C. State Bd. of Elections, Numbered Memo 2020-23 at 2 (Sept. 22, 2020), https://bit.ly/333yE3H (attached hereto as Ex. 1 at 39–43).

69. Moreover, Numbered Memo 2020-23 does nothing to prevent the anonymous and unlawful delivery of votes. After stating that "an absentee ballot may not be left in an unmanned drop box," *i.e.*, a place where county officials are not confirming the identity of the mail deliverer at all, the memorandum plainly discloses the Board's lack of desire to enforce the ban on anonymous deliveries of ballots. To that end, local voting sites that have "a mail drop or drop box used for other purposes . . . must affix a sign stating that voters may not place their ballots in the drop box." "However, a county board may not disapprove a ballot solely because it is placed in a drop box." Thus, Numbered Memo 2020-23 plainly discloses that votes that are illegally placed in a drop box—with only a mere sign saying they should not be so placed—will be counted. This fundamentally undermines the General Assembly's criminal prohibition on the delivery of ballots

by those whom it has not authorized, as it provides a clear avenue for ballot harvesters to submit absentee ballots in drop boxes after hours that will nonetheless be counted. *Id.* at 1, 3.

70. Groups supporting Democratic candidates have brought numerous lawsuits challenging the restrictions on ballot harvesting, and thus will be more involved in delivering completed ballots under these Memoranda than groups supporting Republican candidates. *See* Amended Complaint, *N.C. Alliance for Retired Ams.* (Wake Cnty. Super. Ct. Aug. 17, 2020) (attached hereto as Ex. 9); Amended Complaint, *Stringer v. North Carolina*, No. 20-CVS-5615 (Wake Cnty. Super. Ct. July 8, 2020) (attached hereto as Ex. 10); Second Amended Complaint, *Democracy N.C.* (M.D.N.C. June 18, 2020) (attached hereto as Ex. 11); Second Declaration of Tomas Lopez ¶ 2(d), *Democracy N.C.*, ECF No. 73-1 (attached hereto as Ex. 12).

71. Numbered Memo 2020-19, as amended, Numbered Memo 2020-22, and Numbered Memo 2020-23 are each dated September 22, 2020. These modifications thus come well after North Carolina began mailing out absentee ballots on September 4, 2020. *See* Pam Fessler, *Voting Season Begins: North Carolina Mails Out First Ballots*, NPR.ORG (Sept. 4, 2020) https://bit.ly/2Gb2dY2; N.C. GEN. STAT. § 163-227.10. Director Bell has acknowledged that absentee ballots are sent out on a "rolling" basis. As of September 22, 2020 at 4:40 a.m. (several hours before the three Memoranda were announced), 153,664 absentee ballots had *already been cast*. Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 22, 2020), *available at* https://bit.ly/33SKzAw. Each and every one of those ballots cast with a different set of rules than those which now apply post-September 22, 2020 with the three Memoranda.

72. Two of the ballots that had already been cast when the September 22, 2020 Memoranda issued were of Plaintiffs Heath and Whitley. Both Plaintiff Heath and Plaintiff Whitley requested their absentee ballots, voted their absentee ballots, and returned their absentee

ballots to their respective County Board of Elections under the statutory rules that existed before Defendants altered those rules on September 22, 2020. This means that both Plaintiffs Heath and Whitley, following the statutory requirement and the instructions on their absentee ballots, obtained a witness over the age of 18 who was not otherwise disqualified to witness their ballot and that they returned that ballot by mail before election day. According to the State Board of Election's website Plaintiff Heath's ballot was validly returned on September 21, 2020 and Plaintiff Whitley's ballot was validly returned on September 17, 2020.

The Board's Memoranda Injure the Plaintiffs

73. Implementation of the Board's unconstitutional Memoranda is causing a direct, concrete, and particularized injury to the Legislative Plaintiffs' interest in the validity of the duly-enacted laws of North Carolina and the Legislative Plaintiffs' constitutional prerogative to regulate the federal elections in North Carolina.

74. The arbitrary issuance of unconstitutional memoranda in the middle of ongoing voting by thousands of North Carolina's is a direct, concrete, and particularized injury to Plaintiffs Heath and Whitley who cast their absentee ballots prior to the release of the Memoranda. Since these Memoranda have arbitrarily changed the requirements for lawful casting of ballots, these Memoranda deprive Plaintiffs Heath and Whitley of the Equal Protection Clause's guarantee of the "nonarbitrary treatment of voters." *Bush*, 531 U.S. at 105–06. And since the Memoranda instruct county boards to accept ballots that would be otherwise unlawful under North Carolina's election statutes, each unlawfully cast vote "dilutes" the weight of Plaintiffs Heath's and Whitley's vote. When it comes to "'dilut[ing] the influence of honest votes in an election,'" whether the dilution is "'in greater or less degree is immaterial;'" it is a violation of the Fourteenth

Amendment. *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962).

75. Implementation of the Board's unconstitutional Memoranda are also causing a direct, concrete, and particularized injury to Plaintiff Swain. The Memoranda instruct county boards to accept ballots that would otherwise be unlawful under North Carolina's election statutes, and North Carolina Democrats are requesting and submitting absentee ballots at a higher rate than North Carolina Republicans, thereby injuring Plaintiff Swain by causing his election race to be administered in an unlawful and arbitrary manner. Additionally, groups supporting Democratic candidates will be more involved in filing ballots under these Memoranda (as these groups requested the changes) than groups supporting Republican candidates, further causing the election race to be administered in an unlawful and arbitrary manner.

CLAIM FOR RELIEF

COUNT I

Violation of the Elections Clause (U.S. CONST. art. I, § 4, cl. 1); 42 U.S.C. § 1983

76. The facts alleged in the foregoing paragraphs are incorporated by reference.

77. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. 1, § 4, cl. 1 (emphasis added).

78. The Elections Clause requires that state law concerning federal elections be "prescribed in each State by the Legislature thereof." That mandate operates as a limitation on how states may regulate federal elections. *See Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from denial of certiorari). Whatever the scope of the state courts' authority in other contexts, under the United States

Constitution they may not "prescribe[]" "[r]egulations" governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."

79. The Board is *not* the Legislature of North Carolina. The General Assembly is. N.C. CONST. art. II, § 1.

80. The Board promulgated three Memoranda that are inconsistent with the General Assembly's duly-enacted elections laws.

81. Numbered Memo 2020-19 allows for absentee ballots without a witness in direct contravention of the General Assembly's duly-enacted Witness Requirement.

82. Numbered Memo 2020-19 and Numbered Memo 2020-22 establish a nine-day deadline for the receipt of absentee ballots in direct contravention of the General Assembly's duly-enacted three-day Receipt Deadline. Numbered Memo 2020-22 also expands the class of ballots that can be accepted if received after Election Day.

83. Numbered Memo 2020-23 undermines the General Assembly's criminal prohibition on the delivery of absentee voters by approving the counting of unlawfully delivered ballots.

84. All three Memoranda thus usurp the General Assembly's sole authority to prescribe the regulations governing federal elections in North Carolina.

85. The Board has and will continue to act under color of state law to violate the Elections Clause.

86. Plaintiffs have no adequate remedy at law, and the Memoranda will continue to inflict serious and irreparable harm to the constitutional right to regulate federal elections in North Carolina unless the Board is enjoined from enforcing them.

COUNT II

Violation of the Equal Protection Clause (U.S. CONST. amend. XIV, § 1); 42 U.S.C. § 1983

87. The facts alleged in the foregoing paragraphs are incorporated by reference.

88. The Equal Protection Clause of the Fourteenth Amendment provides that state laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

89. As relevant here, the Equal Protection Clause protects voters' rights in two ways. First, the Equal Protection Clause ensures that voters may "participate in" elections "on an equal basis with other citizens." *Dunn*, 405 U.S. at 336. To that end, "a State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05 (internal citation and quotation marks omitted).

90. The Board issued the three Memoranda after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly. This "later arbitrary and disparate treatment" of absentee ballots deprives Plaintiffs Heath and Whitley of the Equal Protection Clause's guarantee because it allows for "varying standards to determine what [i]s a legal vote." *Id.* at 104–105, 107.

91. Second, the Equal Protection Clause ensures voters' rights to have their ballots counted "at full value without dilution or discount." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). After all, "[o]bviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballot and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted," in turn, means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

92. Both direct denials and practices that otherwise allow for the counting of unlawful ballots dilute the effectiveness of individual votes, thus, can violate the Fourteenth Amendment. *See id.* at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

93. The Board's Memoranda ensures the counting of votes that are *invalid* under the duly enacted laws of the General Assembly in three ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Numbered Memo 2020-19; (2) by allowing absentee ballots to be received up to nine days after Election Day, *see id.*; *see also* Numbered Memo 2020-22; and (3) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see* Numbered Memo 2020-23.

94. In addition to allowing illegally cast ballots to count, the practices enabled and allowed by the Memoranda are also open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the vote of Plaintiffs Heath and Whitley.

95. The Board has and will continue to act under color of state law to violate the Equal Protection Clause and its guarantees.

96. Plaintiffs Heath and Whitley have no adequate remedy at law and will suffer serious and irreparable harm to their Constitutional right to equal protection of the laws and to participate in federal elections in North Carolina on an equal basis unless the Board is enjoined from enforcing these Memoranda.

PRAYER FOR RELIEF

Plaintiffs respectfully request that:

(a) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-19 is unconstitutional under the Elections Clause and invalid;

(b) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-22 is unconstitutional the Elections Clause and invalid;

(c) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-23 is unconstitutional the Elections Clause and invalid;

(d) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that by issuing Numbered Memo 2020-19, Numbered Memo 2020-22, and Numbered Memo 2020-23, the Board violated the Equal Protection Clause rights of Plaintiffs Heath and Whitley.

(e) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-19 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(f) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-22 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(g) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-23 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(h) The Court award Plaintiffs their reasonable costs and attorneys' fees under 42 U.S.C. § 1988; and

(i) The Court grant Plaintiffs such other and further relief as may be just and equitable.

Dated: September 26, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRACY NORTH CAROLINA, THE LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DONNA PERMAR, JOHN P. CLARK, MARGARET B. CATES, LELIA BENTLEY, REGINA WHITNEY EDWARDS, ROBERT K. PRIDDY II, SUSAN SCHAFFER, and WALTER HUTCHINS,	)	
Plaintiffs,	)	
v.	)	1:20CV457
THE NORTH CAROLINA STATE BOARD OF ELECTIONS, DAMON CIRCOSTA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS, STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS, KEN RAYMOND, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS, JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS, DAVID C. BLACK, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS, KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS, THE NORTH CAROLINA DEPARTMENT OF	)	

TRANSPORTATION, J. ERIC BOYETTE, in his official capacity as TRANSPORTATION SECRETARY, THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and MANDY COHEN, in her official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendants.

and

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, and TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES,

Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

Presently before the court are Defendant-Intervenors Philip E. Berger and Timothy K. Moore's ("Legislative Defendants") Motion for All Writs Act Relief, (Doc. 154), and Plaintiffs' Motion for Affirmative Relief, (Doc. 156). This court finds that the North Carolina State Board of Elections improperly used this court's Memorandum Opinion and Order of

August 4, 2020, in setting out its revised Numbered Memo 2020-19, thereby frustrating and circumventing the already-issued preliminary injunction order, (Doc. 124), over which this court has continuing jurisdiction. This court will grant Defendant-Intervenors' motion in part to enjoin the State Board of Elections' elimination of the witness requirement. Plaintiffs' motion will be denied.

I. FACTUAL BACKGROUND

On August 4, 2020, this court issued a preliminary injunction order, (Memorandum Opinion and Order, ("August Order") (Doc. 124)), that "left the One-Witness Requirement in place, enjoined several rules related to nursing homes that would disenfranchise Plaintiff Hutchins, and enjoined the rejection of absentee ballots unless the voter is provided due process." (Id. at 3.) This court's August Order is still in effect, as no party has appealed this court's grant of a preliminary injunction recognizing and ensuring voters' Due Process rights.

A. Communications Prior to August 21, 2020

Shortly after this court issued the August Order, in a letter dated August 12, 2020, Plaintiffs communicated with Defendant State Board of Elections ("SBE") officials regarding Plaintiffs' understanding that this court's August Order would

require any "law or rule" that SBE issued to "provide voters with timely notice of any issues that would cause their ballot to be rejected, as well as an opportunity to be heard such that voters may cure those deficiencies[1] and have their votes properly counted." (Doc. 148-2 at 2.)[2]

In particular, Plaintiffs advised Defendant SBE officials of "what, in Plaintiffs' view, [were] the required elements of the law or rule required by the Court in order to satisfy due process." (Id. at 3.)

First, Plaintiffs requested "[p]rompt identification and notice," for "those issues easily identified on the face of the absentee ballot envelope . . . ." (Id.) For those issues, "[C]ounty board of election staff members should identify and provide notice to the voter of any defect that [would] prevent their vote from being counted within 1 business day of receiving the ballot." (Id.) Plaintiffs requested that notice occur

[1] This statement by Plaintiffs misstates this court's order. That order is limited to requiring the SBE to provide "due process as to those ballots with a material error that is subject to remediation." (August Order (Doc. 124) at 187.) The August Order did not require provision of a cure for every deficiency.

[2] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

"before the next county board of elections meeting in which the board approves and rejects ballots," which Plaintiffs indicated in its letter, would "start 5 weeks before Election Day." (Id.)

Second, Plaintiffs requested "[n]otice by all means reasonably available," specifically of "a material defect and the method of curing that defect." (Id.) "Notice of the material defect and method of curing it should also be provided on the online tracking tool (which is required under H.B. 1169 . . .)." (Id.) Plaintiffs further said that "[s]uch outreach should include looking for contact information beyond that provided by the voter on the absentee application envelope, including, at least, using mail, telephone, and email to the extent that information is available from voter registration forms and on the SEIMS [statewide election information management] database." (Id.)

B. Release of Memo 2020-19

In response, on August 21, 2020, SBE officials released guidance for "the procedure county boards must use to address deficiencies in absentee ballots." (Numbered Memo 2020-19 ("the original Memo 2020-19" or "the original Memo") (Doc. 148-3 at 2).) This guidance instructed county boards regarding multiple topics. First, it instructed county election boards to "accept [a] voter's signature on the container-return envelope if it

appears to be made by the voter . . . [a]bsent clear evidence to the contrary," even if the signature is illegible. (Id.)

Next, the original Memo sorted ballot deficiencies into two categories: curable and uncurable deficiencies. (Id. at 3.) Under Memo 2020-19, a ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. (Id.) A ballot error could not be cured in the case of all other listed deficiencies, including a missing signature, name, or address of the witness; an incorrectly placed witness or assistant signature; or an unsealed or re-sealed envelope. (Id.) Counties were required to notify voters regarding any ballot deficiency that could be cured within one day of the county identifying the defect. After a voter was notified of the deficiency, the voter was required to return a cure affidavit by Thursday, November 12. (Id. at 4.) In the case of an incurable defect, a new ballot could be issued only "if there [was] time to mail the voter a new ballot . . . [to be] receive[d] by Election Day." (Id. at 3.) If a voter who submitted an uncurable ballot was unable to receive a new absentee ballot in time, he or she would have the option to vote in person on Election Day.

C. Communications Following August 21, 2020

Soon thereafter, on August 26, 2020, Plaintiffs sent the SBE and Executive Defendants a letter expressing concern about the efficacy of Memo 2020-19, claiming that the protections it laid out "[did] not satisfy due process as required by the Court's [August] Order." (Doc. 148-4 at 2.) In this letter, Plaintiffs listed several Due Process concerns about the cure process guidance. These concerns included: (1) the lack of a timeframe for reviewing absentee ballots for deficiencies, (2) "unclear procedures for voter notification" if a cure is necessary, (3) the lack of a remote option for voters to "contest the disapproval of their deficient ballot," (4) a lack of "any indication as to how the cure process will be . . . monitored and enforced," (5) the Memo's failure to "clearly prohibit counties from implementing a signature verification process," and (6) ambiguity around the acceptability of unique electronic signatures. (Id. at 2-4.)[3]

After explaining these concerns, Plaintiffs noted that since "counties will start mailing absentee ballots on September 4, 2020 . . . Plaintiffs may find it necessary to file

[3] Again, while Plaintiffs' requests may be appropriate policy considerations, these processes seem to contemplate a cure for all cases, a remedy this court did not, and does not, deem required by Due Process. See discussion supra at 4 n.1.

an affirmative motion to enforce the injunction should Defendants fail to implement an adequate law or rule by [September 4th]." (Id. at 4.) However, no motion was filed, and nothing further was brought to the attention of this court prior to September 4th.

D. Revision of Numbered Memo 2020-19

The State began issuing ballots on September 4, 2020, marking the beginning of the election process. Over two weeks later, on September 22, the SBE attempted to revise its original guidance to address Plaintiffs' remaining concerns. (Numbered Memo 2020-19 ("the Revised Memo" or "Revised Memo 2020-19") (Doc. 143-1).) 153,664 absentee ballots were received by the SBE between September 4 and September 22. Absentee Data, N.C. State Bd. of Elections (Sept. 22, 2020). The SBE cited the August Order as "consistent with" its revisions, (Notice of Filing (Doc. 143) ¶ 1), which set forth a variety of new policies not implemented in the original Memo 2020-19. (See Revised Memo (Doc. 143-1).) The revised guidance extended the deadline for absentee ballots to be received out to November 12, 2020. (Id. at 4.) It also altered which ballot deficiencies fell into the curable and uncurable categories: unlike Memo 2020-19, the Revised Memo advised that ballots missing a witness or assistant name or address, as well as ballots with a missing or misplaced

witness or assistant signature, could be cured via voter certification. (Id. at 2.) This certification could be filed through November 12, 2020, eight days after Election Day. (Id. at 4). The Executive Defendants filed notice of this revised guidance with the court on September 28, 2020. (Notice of Filing (Doc. 143), only one day before the processing of absentee ballots was scheduled to begin. ((Doc. 148) at 11.)

E. Consent Judgment in North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections

On August 10, 2020, the North Carolina Alliance for Retired Americans ("NC Alliance Intervenors"), who are Defendant-Intervenors in two cases presently before this court; Moore v. Circosta, No. 1:20CV911 (M.D.N.C. filed Oct. 5, 2020), and Wise v. N.C. State Bd. of Elections, No. 1:20CV912 (M.D.N.C. filed Oct. 5, 2020); filed an action against the SBE in North Carolina's Wake County Superior Court. (Moore v. Circosta, No. 1:20CV911 (Doc. 68-1) at 15.) They challenged, among other voting rules, the witness requirement for mail-in absentee ballots and rejection of mail-in absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election. (Id.) On August 12, 2020, Philip Berger and Timothy Moore, who are also Plaintiffs in Moore, became parties to the state action as intervenor-

defendants on behalf of the North Carolina General Assembly. (Id. at 16.)

On September 22, 2020, the same day the Revised Memo was released, SBE and NC Alliance filed a Joint Motion for Entry of a Consent Judgment with the superior court. (Id.) Philip Berger and Timothy Moore were not aware of this "secretly-negotiated" Consent Judgment, (Wise v. N.C. State Bd. of Elections, No. 1:20CV912 (Doc. 43) at 7), until the parties did not attend a previously scheduled deposition, (1:20CV457 (Doc. 168) at 73.)

Among the terms of the Consent Judgment, SBE agreed to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine days after Election Day, to implement the cure process established in the Revised Memo 2020-19, and to establish separate mail-in absentee ballot "drop off stations" at each early voting site and county board of elections office which were to be staffed by county board officials. (Doc. 68-1 at 16.)

In arguing that the North Carolina Superior Court should approve and enter the Consent Judgment, SBE cited this court's August Order from Democracy. SBE argued that a cure procedure for deficiencies related to the witness requirement were necessary because "[w]itness requirements for absentee ballots have been shown to be, broadly speaking, disfavored by the

courts," (id. at 26), and that "[e]ven in North Carolina, a federal court held that the witness requirement could not be implemented as statutorily authorized without a mechanism for voters to have adequate notice of and [an opportunity to] cure materials [sic] defects that might keep their votes from being counted." (Id. at 27.) SBE argued that, "to comply with the State Defendants' understanding of the injunction entered by Judge Osteen, the State Board directed county boards of elections not to disapprove any ballots until a new cure procedure that would comply with the injunction could be implemented," (id. at 30), and that ultimately, the cure procedure introduced in the Revised Memo 2020-19 as part of the consent judgment would comply with this injunction. (Id.)

On October 2, 2020, the Wake County Superior Court entered the Stipulation and Consent Judgment. (Doc. 166-1.) Among its recitals, which Defendant SBE drafted and submitted to the judge as is customary in state court, (Moore v. Circosta, No. 1:20CV911 (Doc. 70) at 90-91), the Wake County Superior Court noted this court's preliminary injunction in Democracy, finding,

> WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from the "disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-cv-00457-WO-JLW

> (M.D.N.C. Aug. 4, 2020) (Osteen, J.). ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." Id.

(Id. at 19; (Doc. 166-1) at 5.) Additional facts will be addressed in the analysis where necessary.

F. Current Requests for Relief

This court requested a status conference on Wednesday, October 7, 2020. (Doc. 146.) Only after this point did Plaintiffs file a motion with this court, (Doc. 147), requesting enforcement of a preliminary injunction on the basis of the August Order, claiming that even the Revised Memo failed to meet Due Process requirements as outlined by the August Order. (Pls.' Mem. of Law in Supp. of Mot. to Enforce Order Granting in Part Prelim. Inj., or, in the Alternative, Mot. for Clarification, and to Expedite Consideration of Same ("Pls.' Br. on Mot. to Enforce") (Doc. 148) at 13.) As noted previously, the processing of absentee ballots had already started on September 29, 2020. (Id. at 11.) Both Legislative Defendants and Plaintiffs subsequently filed motions for affirmative relief: Legislative Defendants seek injunction of the Revised Memo 2020-19, (Doc. 154), while Plaintiffs seek injunction of both Memos and further guidance from the court on proper election procedure, (Doc.

156). Only the Executive Defendants have argued, in their Response to Plaintiffs' Motion to Enforce Order ("Exec. Defs.' Resp.") (Doc. 151) at 2) that the Revised Memo 2020-19 is the correct operative guidance, claiming it was necessary in order to comply with this court's August Order.

II. ANALYSIS

A. The Preliminary Injunction Order

Before turning to analysis of the pending motions, this court will address an issue with the parties' use of certain language from the August Order.

In an effort to provide context for the August Order and to perhaps avoid additional future litigation, this court provided certain observations as to what might be required in relation to voting processes during the COVID-19 pandemic in light of this court's order. (See August Order (Doc. 124) at 3-6.) After careful review of the pleadings and attachments filed following the issuance of that Order, it appears to this court that language was either misunderstood or has been misconstrued. The language has been cited in support of unreasonable demands, inaction, and acts that appear to ignore the rule of law. This court does not make policy decisions for legislative branches or executive offices, nor were its observations intended to substitute for the rule of law.

In light of this concern, the court has considered striking those findings. This court, instead, notes for clarification that those comments were not, and are not, intended to suggest that the circumstances created by COVID-19 can or should be used to disregard the rule of law or the Constitution. Nor were those statements intended to suggest a source of authority for acts or requests not otherwise permitted by the rule of law.

B. Sufficiency of the Original Memo 2020-19

Plaintiffs' Motion for Affirmative Relief, (Pls.' Mot. for Affirmative Relief (Doc. 156)), asks this court to find that both the original Memo 2020-19 and the Revised Memo 2020-19 are insufficient to respond to this court's August Order. (Id. at 16, 34.) Though the guidance contained in the original Memo 2020-19 may not be perfect, it sufficiently complied with this court's August Order. Even if the original Memo 2020-19 fell short, reliance on this court's order for further election rule changes after September 4, 2020 – as in the Revised Memo 2020-19 – is not appropriate under the facts and circumstances of this case.

1. Due Process

This court's August Order "enjoined the rejection of absentee ballots unless the voter is provided due process." (August Order (Doc. 124) at 3.) The August Order noted that

"[t]here are currently no procedures in place statewide that would either notify a voter that their absentee ballot has a material error nor allow such a voter to be heard in challenging such a rejection." (Id. at 157-58.) The injunction ordered that the SBE was prohibited from "the disallowance or rejection . . . of absentee ballots without Due Process as to those ballots with a material error that is subject to remediation." (Id. at 187.)

This court finds that the original Memo 2020-19, issued by the SBE on August 21, 2020, (Doc. 148-3), sufficiently addressed this court's concerns regarding Due Process. The guidelines[4] set out by the original Memo 2020-19 sufficiently addressed errors "subject to remediation," (Doc. 124 at 187), also referred to as curable defects.[5] Memo 2020-19 laid out statewide procedures by which absentee ballots with reasonable, minor deficiencies could be cured by voters. If a voter failed to sign the certification,

[4] Plaintiffs argue that the Numbered Memos do not qualify as rules or laws "independently enforceable beyond the discretion of the SBE," and are therefore insufficient to satisfy this court's August Order. (Pls.' Br. on Mot. to Enforce (Doc. 148) at 14-15.) This court disagrees: the SBE was directly charged with remedying the Due Process concerns identified in the court's August Order. The Numbered Memos served as binding guidance which county boards were "required to follow." (Exec. Defs.' Resp. (Doc. 151) at 9.) This is sufficient for the purposes of this court's August Order.

[5] This court does not consider a missing witness signature a mere curable defect. See discussion infra, Part II.B.1.

or signed in the wrong place, the ballot could be cured with an affidavit from the voter. (Original Memo 2020-19 (Doc. 148-3) at 2.)

On the other hand, if a deficiency led to the ballot being spoiled "because the missing information [came] from someone other than the voter[,]" such as the absence of a witness signature, then the county board was obligated to "reissue a ballot along with a notice explaining the county board office's action." (Id. at 3.) This allows voters to respond to ballot rejections and requires prompt notification of voters if their ballots contain uncurable errors.

Plaintiffs present several critiques of the SBE's guidance in both versions of Numbered Memo 2020-19. First, they note that Memo 2020-19 does not "specify a timeline by which counties must review absentee ballot applications for deficiencies." (Pls.' Br. on Mot. to Enforce (Doc. 148) at 18-19.) Second, Plaintiffs emphasize that the original Memo 2020-19 does not go the extra step of requiring counties to contact voters with ballot deficiencies via phone number and email rather than via

traditional mail only.[6] (Id. at 20-21.) Finally, Plaintiffs claim that both versions of Memo 2020-19 fall short by failing to provide voters with remote opportunities to attend county canvasses and remedy material errors. (Id. at 24.) Though these complaints might have some value, they do not undermine the overall adequacy of Memo 2020-19 in addressing this court's original Due Process concerns. Due Process does not guarantee that every attempted ballot is counted – rather, Due Process ensures that an individual voter will receive notice and an opportunity to be heard in certain circumstances. It does not, and cannot, be used to displace the state's election statutes or delay the election.

Based on these criticisms, Plaintiffs urge this court to adopt certain provisions within the Revised Memo in a piecemeal manner. (Pls.' Mot. for Affirmative Relief (Doc. 156) at 10-14). Plaintiffs urge the court to "order the State Board of Elections to [implement specific, listed reforms]" in the name of Due

[6] Regardless of the merits of Plaintiffs' grievance regarding the shortcomings of mail-only notifications, the original Memo 2020-19 still meets the bar set out in this court's August Order. Furthermore, as this concern was not raised with this court prior to the start of the election, and in light of Purcell v. Gonzalez, 549 U.S. 1 (2006), this court finds Plaintiffs' delay a serious and confounding issue that would merit denial of additional injunctive relief for that reason alone.

Process. (Id. at 34.) Despite Plaintiffs' request, this court's role does not entail picking and choosing those electoral reforms it views as wise from a policy perspective. This court may only adjudicate whether the bar of Due Process has been met, which this court finds it has under the original Memo 2020-19.

Though the original Memo may not perfect the absentee process, it addresses this court's Due Process concerns as expressed in the August Order, particularly as to notice and an opportunity to be heard prior to rejection. This court's August Order, (Doc. 124), was never intended to create insurmountable hurdles for the SBE's rejection of an absentee ballot under any circumstances. Even if the original Memo 2020-19 were insufficient, the application of Revised Memo 2020-19 in its stead cannot be justified on the basis of this court's August Order.

2. Delay in Seeking Injunctive Relief

Moreover, Plaintiffs have delayed too long in seeking enforcement of the order and rejection of both versions of Memo 2020-19. This undermines Plaintiffs' case for further affirmative relief at this juncture. Some courts have found that delay in seeking injunctive relief is a clear indicator of "an absence of the kind of irreparable harm required to support a preliminary injunction." Citibank, N.A. v. Citytrust, 756 F.2d

273, 276 (2d Cir. 1985). The Fourth Circuit has taken a less exacting approach, following the Ninth and Tenth Circuits in weighing delay as a non-dispositive factor in the granting of preliminary injunctive relief. See Candle Factory, Inc. v. Trade Assocs. Grp., Ltd., 23 F. App'x 134, 138 n.2 (4th Cir. 2001) (citing Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs., 31 F.3d 1536 (10th Cir. 1994); Lydo Enters., Inc. v. City of Las Vegas, 745 F.2d 1211, 1213, 1213-14 (9th Cir. 1984).)

In different circumstances, the delay by Plaintiffs of nearly six weeks - from the issuance of the original Memo 2020-19 on August 21 to the filing of this motion to enforce order on September 30 – might not weigh as heavily in the court's analysis. Here, however, the extraordinary circumstances at hand bring Purcell considerations into the delay analysis as well. Purcell v. Gonzalez, 549 U.S. 1 (2006). Plaintiffs acknowledged in August the need for any and all revisions to be made prior to September 4, when ballots were released. (See (Doc. 148-4) at 4 ("As counties will start mailing absentee ballots on September 4, 2020 and thus begin receiving them shortly thereafter, Plaintiffs may find it necessary to file an affirmative motion to enforce the injunction should Defendants fail to implement an adequate law or rule by this date.").) No

further guidance was issued by the SBE by September 4. However, Plaintiffs still failed to file any such motion with the court until over 30 days after the issuance of the original Memo and their August 26 letter to the SBE. (Doc. 147.) As to this delay, additional facts further undermine any argument by Plaintiffs that they acted diligently and promptly. As noted earlier, none of the parties to this case notified this court or requested relief following the issuance of the original August 21 Memo 2020-19. Instead, on September 28, 2020, the SBE filed its Notice of Filing, (Doc. 143), alleging the Revised Memo 2020-19 was "consistent with the [court's] Order." (Id. at 1.) Plaintiffs did not respond to the Notice in any fashion. On September 30, 2020, this count entered its order stating that Revised Memo 2020-19 was not consistent with the August Order. (Doc. 145 at 3.) It was on that date, September 30, and after this court's order, that Plaintiffs filed a motion requesting additional relief. (Doc. 147.) Plaintiffs' motion requesting additional relief was filed 24 days after the start of the election, after absentee ballots had been received with material defects, and the day before absentee ballots were subject to processing.

Given the obligation of federal courts to avoid changing election rules whenever possible under Purcell, see discussion

infra Part II.B.2, Plaintiffs' decision to wait until after September 4 to file their motion constituted substantial delay that, in this instance, precludes the granting of additional injunctive relief to Plaintiffs.

C. All Writs Act Relief

Legislative Defendants request that this court "affirmatively enjoin the issuance and enforcement of the [Revised Memo] under the All Writs Act," (Doc. 155 at 22-23), or, "at minimum . . . restrain the NCSBE from relying on this Court's [August Order] to issue the [Revised Memo 2020-19]." (Doc. 150 at 6.) This court will grant Legislative Defendants' motion in part: while Purcell counsels against enjoining the entirety of the Revised Memo, this court finds the All Writs Act ("AWA") authorizes this court to enjoin the SBE's effective elimination of the witness requirement as a remedial action under this court's preliminary injunction order.

Though this court will not enjoin the entirety of the Revised Memo, it will enjoin the witness signature cure process created by the Revised Memo. The cure process provided for witness signatures is inconsistent with this court's August Order, which found the state's statutory witness requirement constitutional. (August Order (Doc. 124) at 102.) This court found that the witness requirement was constitutional while the

absence of Due Process procedures was unconstitutional. (Id.) Using the court's Due Process language to effectively override the legislative witness requirement, after this court upheld it – in the supposed name of Due Process - is an unacceptable misuse of the remedy created by this court's order. The State Board's mischaracterization of this court's injunction in order to obtain contradictory relief in another court frustrates and circumvents this court's August Order, (Doc. 124). Remedial action under the AWA is necessary to prevent frustration and misuse of this court's preliminary injunction.

1. Legal Standard Under the All Writs Act

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Supreme Court has "repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued[.]" United States v. New York Tel. Co., 434 U.S. 159, 172 (1977). However, as the All Writs Act is to be used "sparingly and only in the most critical and exigent circumstances," Wis. Right to Life, Inc. v. Fed. Election

Comm'n, 542 U.S. 1305, 1306 (2004) (internal quotation marks and citations omitted), it is often used when a court is seeking to enforce its previous order in the face of blatant violations. See, e.g., SAS Inst., Inc. v. World Programming Ltd., 952 F.3d 513, 521 (4th Cir. 2020), petition for cert. docketed (U.S. Sept. 9, 2020) (No. 20-304) (applying the AWA where a party has "frustrat[ed] . . . orders [the court] has previously issued"); Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1100 (11th Cir. 2004) (finding that obtaining an AWA injunction requires "some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else's action or behavior"); Phillips Beverage Co. v. Belvedere, S.A., 204 F.3d 805, 806 (8th Cir. 2000) (applying the AWA where a party "attempted to make an end run around the district court's refusal to grant the interim relief [it] sought in a case over which the district court continued to have jurisdiction by . . . asking Customs to do what the district court would not"); In re Application of U.S. for an Order Directing X to Provide Access to Videotapes, No. 03-89, 2003 WL 22053105, at *3 (D. Md. Aug. 22, 2003) (using the AWA in order to "prevent[] frustration of this court's previously issued . . . warrant").

2. Frustration of this Court's August Order

The State Board vehemently argues it had no intention of frustrating this court's August Order: according to the SBE, the Revised Memo was issued – and the Consent Judgment agreed upon – in a sequence of events unrelated to actual compliance with the August Order. The Board argues that it believed the revisions were consistent with, and not required by, this court's August Order. The State Board of Elections continued to maintain this throughout oral argument before this court on October 7:

> Again, I just wanted to be clear. The State Board was not -- when it revised the memo in September, it was not revising it because it believed those revisions were necessary to comply with your order. It was revising it because it believed that those revisions were necessary to deal with what was actually happening on the ground and because it believed that those revisions could assist in settling protracted litigation, avoiding protracted litigation.

(Doc. 168 at 87 (emphasis added).) The record, however, explicitly disproves this fact. Exactly one week earlier, on September 30, the SBE filed a state court brief supporting its request for a Consent Judgment in the Alliance action. (Doc. 165-1.) Its representations in that brief stand in stark contrast to its representations to this court. (Id. at 15.) In its September 30 brief to the North Carolina Superior Court, only one week prior to oral argument before this court, the SBE

directly cited this court's August Order as the reason for its "new cure procedure":

> As a result, and to ensure full compliance with the injunction entered by Judge Osteen, the State Board directed county boards of elections not to disapprove any ballots until a new cure procedure that would comply with the State Defendants' understanding [of] the injunction could be implemented. On September 22, 2020, the State Board instituted the cure procedure attached to the proposed consent judgment. The State Board subsequently notified the federal court of its cure mechanism process.

(Id.) (emphasis added). The SBE clearly informed the state court that the revisions were needed "to ensure full compliance with the injunction entered by Judge Osteen." (Id.) Remarkably, the SBE then claimed in this brief that it had "notified [this] federal court of its cure mechanism process." (Id.) No such notification occurred until September 28, 2020. (Notice of Filing (Doc. 143)), only one day before review of absentee ballots was set to begin. (Pls.' Br. on Mot. to Enforce (Doc. 148) at 11.) That notice alleged the Revised Memo was "consistent with the [court's] Order." (Notice of Filing (Doc. 143) at 1.) On September 30, 2020, this court entered an order, (Doc. 145), in response to the SBE's notice, specifically finding that "this court's order cannot in any way be construed to permit a missing witness signature to be cured by 'sending

the voter a certification,' as indicated by [Revised] Memo 2020-19." (Id. at 4.)

It was only after this court issued that order that the SBE modified its argument by arguing before the North Carolina Superior Court - contrary to its brief - that the cure process in place was not required by the August Order, but instead was the result of the SBE's authority under state law. (N.C. Super. Ct. Hr'g Tr. (Doc. 167-1) at 26.)

Of course, notwithstanding that representation, the SBE in its proposed state court order still included this court's August Order in the recitals as requiring a cure mechanism. (Doc. 166-1 at 5.) That recital of this court's order is the only authority directly cited as authority to implement the cure mechanism. This court finds the SBE did not, and was not, relying upon N.C. Gen. Stat. § 163-22.2 or § 163-27.1 as authority for a cure process. Instead, the SBE relied upon this court's order and injunction requiring Due Process, (Doc. 124), to support a "cure" for an absentee ballot which eliminated the witness requirement. Similarly, during oral argument before the state court, the SBE made several additional references to this court's August Order as requiring some "cure process" – which, in light of the brief, further mischaracterizes the August Order

as a directive to "cure" the witness requirement. (See N.C. Super. Ct. Hr'g Tr. (Doc. 167-1) at 24-26.)

As if these misrepresentations were not enough, in its brief to the state court, the SBE directly stated that this court's August Order held the opposite of what it really held:

> Second, the court enjoined defendants "from the disallowance or rejection, or permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation," and directed the adoption of procedures "which provide[] a voter with notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." Id. at *182. These changes were necessary, the court rules, because North Carolina's witness requirement as statutorily authorized was likely unconstitutional.

(Doc. 165-1 at 14 (emphasis added).) This representation was patently not true: this court found that Due Process measures were needed, but the North Carolina witness requirement was in fact constitutional. (August Order (Doc. 124) at 102 ("Plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional challenge to the One-Witness Requirement under the Anderson-Burdick balancing test.").) This court finds the SBE's representations to the North Carolina Superior Court explaining the contents and effect of the August Order, (id.), are at best inaccurate, and were used to support the SBE's argument to obtain approval of the Consent Judgment

and modify the witness requirement. This court's Due Process remedy was used to modify the witness requirement that this court upheld.

In addition to denying its representations about this court's August Order, the SBE also claims it did not frustrate the August Order because its revisions do not actually eliminate the witness requirement. Yet Revised Memo 2020-19 clearly subverts this court's findings in its August Order by effectively eliminating the contemporaneous witness requirement. (Revised Memo (Doc. 143-1) at 2.) According to Ms. Karen Brinson Bell, Executive Director of the SBE, the Revised Memo allowed "an envelope with a missing witness signature [to] be cured by the voter attesting that he or she voted their ballot and is the voter." (Declaration of Karen Brinson Bell ("Bell Decl.") (Doc. 151-3) ¶ 9.) Ms. Bell's declaration contradicts her testimony before this court, in which she stated unequivocally that a ballot with a missing witness signature could not be cured, but instead had to be spoiled:

> You can't have – there's certain things that cannot be cured. . . . If the board determines that there was no witness signature, then you can't say fix this envelope by bringing in a witness because that would not mean that the witness actually witnessed them voting. . . . We could contact them and spoil that particular ballot.

(Evidentiary Hr'g Tr. vol. 2 (Doc. 113) at 121-22.) This court's injunctive order, which specifically applied to a "material error subject to remediation," (August Order (Doc. 124) at 187), was never intended to allow a ballot without a witness to be cured. This court upheld the witness requirement – to claim a cure which eliminates that witness requirement is "consistent with" this court's order is a gross mischaracterization of the relief granted. Ms. Bell attests that the change in the Revised Memo was in line with "the purpose of the witness requirement." (Bell Decl. (Doc. 151-3) ¶ 9 (emphasis added).) However parallel with the requirement's purpose it may have been, this change explicitly eliminated the contemporaneous witness requirement duly enacted by the legislature and found constitutional by this court's order. (Id.)

Legislative Defendants attempt to characterize this change as a mere modification of the witness requirement, claiming the "county board official [who contacted the voter after discovering the deficiency] would act as the voter's witness." (Exec. Defs.' Resp. (Doc. 151) at 6.) However, even Executive Defendants acknowledge this so-called "witnessing" is not contemporaneous with the marking of the ballot. (Id.) Under the 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a), a witness absentee ballot must be "marked in the presence of one qualified

witness." This clear language dictates that the witness must be (1) physically present with the voter, and (2) present at the time the ballot is marked by the voter. The Revised Memo's run-around of the witness requirement clearly falls short of the valid statutory requirement previously upheld by this court. As described supra in Part II.B.2, the SBE advanced different arguments before this court and the North Carolina Superior Court for the witness requirement.

Regardless of its purpose, the cure affidavit proposed by the Revised Memo and the Consent Judgment contains a nearly meaningless certification by the voter that completely eliminates the witness requirement. The certification requires the voter to certify that "I voted and returned my absentee ballot . . . ." (Revised Memo Doc. 143-1 at 6.) In addition to falling short of the statutory witness requirement, this process eliminates the witness and assistance certifications required by North Carolina Session Law 2020-17. 2020 N.C. Sess. Laws 2020-17 (H.B. 1169). This certification does not verify that the ballot presented to a board of elections is the ballot executed by the voter. Nor does the cure certification explain what "voted" means, thereby allowing each individual voter to determine that meaning and the circumstances under which a ballot may be executed. Under the vague "I voted" language used in the

affidavit, a voter who completed his or her ballot with assistance from an unauthorized individual; a voter who does not qualify for voting assistance; or a voter who simply delegated the responsibility for completing their ballot to another person could truthfully sign this affidavit, although all three acts are prohibited under state law. See N.C. Gen. Stat. § 163-226.3(a)(1).

A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 380 (1963). Because the affidavit does not serve as an adequate means to ensure that voters did not engage in unauthorized ballot casting procedures, inevitably, not all voters will be held to the same standards for casting their ballot. This court, for the reasons more fully explained in its orders in Wise v. N. Carolina Bd. of Elections, No. 1:20CV912, and Moore v. Circosta, No. 1:20CV911, issued contemporaneously, points out that the current 'cure' process allows certain voters to certify a ballot according to their own individual definitions of 'to vote.' This court's concerns notwithstanding, however, this court will decline to enjoin the use of a cure affidavit beyond its application as an alternative for compliance with the witness and assistance requirements.

Neither the Revised Memo nor the cure affidavit may be justified by pointing to this court's order expressly upholding the witness requirement. All Writs Act relief is designed for scenarios in which a court's order is directly frustrated – here, the SBE has not only frustrated this court's order, but has also claimed in this court that it never misrepresented the August Order's requirements.

The SBE's Revised Memo is not only misleading to this court; it also creates different classes of voters based upon the voting requirements – all under the guise of Due Process. The voting process began on September 4, 2020. Ballots for absentee mail voting were mailed on that date, along with instructions specifically explaining the witness requirement. As explained previously, more than 153,000 voters filled out ballots under those instructions. Absentee Data, N.C. State Bd. of Elections (Sept. 22, 2020).

Now, under the Revised Memo, voters will continue to receive those instructions and presumably comply. However, those voters who seek assistance from voting organizations or individuals familiar with the Revised Memo may be correctly advised that any ballot missing a witness signature, that is proper in all other respects, can be accepted by the SBE via a cure affidavit. Using a Due Process cure procedure to allow some

voters to ignore the witness requirement, or have their votes counted without witness signatures, all under a claim of complying with this court's order, is a flagrant misuse of this court's injunctive relief. All Writs Act relief is thereby justified in this instance to narrowly enjoin the witness requirement cure procedure implemented in the Revised Memo 2020-19.

3. Application of Purcell

The Supreme Court has made clear that "lower federal courts should ordinarily not alter the election rules on the eve of an election." Republican Nat'l Comm. V. Democratic Nat'l Comm., 589 U.S. ____, ____, 140 S. Ct. 1205, 1207 (2020) (per curiam). Purcell states that a court order affecting election rules will progressively increase the risk of "voter confusion" as "an election draws closer." Purcell, 549 U.S. at 4-5; see also Texas All. for Retired Americans v. Hughs, ____ F.3d ____, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) ("The principle . . . is clear: court changes of election laws close in time to the

election are strongly disfavored.")[7]. Due to Purcell, this court will deny Plaintiffs' motion for affirmative relief and will refrain from enjoining the entirety of the Revised Memo.

While the original Memo 2020-19 before the start of the election was necessary to comply with this court's order, further revision of that Memo after ballots were already being distributed and executed is inconsistent with the principle set forth in Purcell. Though Purcell applies only to federal judicial intervention, it is worth highlighting here that the SBE claimed to be changing election rules after September 4th expressly because a federal court required it, thereby using this court's order to accomplish what Purcell might otherwise prohibit. Plaintiffs argue that Purcell requires courts to "weigh the risk of voter confusion" rather than per se rejecting any "late-breaking" changes in election rules. (Pls.' Mot. for Affirmative Relief (Doc. 156) at 25.) But as the Supreme Court's

[7] As Executive Defendants point out, (Exec. Defs.' Resp. (Doc. 151) at 1-2), the Ninth Circuit has read Purcell less stringently, holding that "courts must assess the particular circumstances of each case in light of the concerns expressed by the Purcell court to determine whether an injunction is proper." Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 368 (9th Cir. 2016). Even under that test, however, this case runs parallel to Purcell. Most importantly, unlike in Feldman, this case does involve "chang[ing] the electoral process." Id. Furthermore, there was "delay in bringing [the] action," id. at 369, as no relief was sought until after the election began.

restoration of the South Carolina witness requirement last week illustrates, a heavy thumb on the scale weighs against this court changing voting regulations unless critically necessary. Andino v. Middleton, ____ S. Ct. ____, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring).

Plaintiffs themselves note that "[t]he delay in revising Numbered Memo 2020-19 has caused confusion and delay by county boards of election in providing voters with due process regarding material errors subject to remediation with their ballots." (Pls.' Br. on Mot. to Enforce (Doc. 148) at 11.) Thousands of voters cast ballots with the understanding that the guidelines in the original Memo 2020-19 applied.[8] Those voters were required to submit a ballot and return envelope with a witness. 153,664 absentee ballots were received by the SBE prior to the implementation of the Revised Memo – not counting those that were filled out and mailed prior to the revision but had not yet been received by the SBE. Absentee Data, N.C. State Bd. of Elections (Sept. 22, 2020). To date, over 492,825 absentee ballots have been cast, while 1,321,515 absentee ballots have

[8] This court recognizes that an unidentified number of voters also filled out and mailed ballots in the eight days between the release of the Revised Memo and the SBE's direction for all action on absentee ballots to cease. (Exec. Defs.' Resp. (Doc. 151) at 8.)

been requested. North Carolina State Board of Elections, Voting Underway in North Carolina, https://www.ncsbe.gov/ (last visited Oct. 13, 2020).

Plaintiffs argue that Purcell does not apply here because "there is no election law change implicated." (Pls.' Mot. for Affirmative Relief (Doc. 156) at 23.) This is a misunderstanding of Purcell. This year alone, the Purcell doctrine of noninterference has been invoked by federal courts in cases involving witness requirements and cure provisions during COVID-19, Clark v. Edwards, Civil Action No. 20-283-SDD-RLB, Civil Action No. 20-283-SDD-RLB, 2020 WL 3415376, at *1-2 (M.D. La. June 22, 2020); the implementation of an all-mail election plan developed by county election officials, Paher v. Cegavske, Case No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *1, *6 (D. Nev. May 27, 2020); and the use of college IDs for voting, Common Cause v. Thomsen, No. 19-cv-323-JDP, 2020 WL 5665475, at *1 (W.D. Wis. Sept. 23, 2020) – just to name a few. Election rule changes which, by Plaintiffs' contention, (Pls.' Mot. for Affirmative Relief (Doc. 156) at 3), affect North Carolina voters' Due Process rights, certainly fall within the intended scope of Purcell. Thus, this court finds that the SBE was unjustified in relying upon this court's August Order as an authority for the Revised Memo. This court's order is an

inappropriate basis for last-minute election rule changes, particularly changes which contradict the order itself. Moreover, in the same vein, and as discussed supra at Part II.B.1, this court will reject Plaintiffs' motion urging the court to "order the State Board of Elections" to implement certain reforms. (Pls.' Mot. for Affirmative Relief (Doc. 156) at 34.)

Finally, even if this court were to find Purcell permits an award of additional relief to Plaintiffs, this court would decline to grant that relief at this time. First, this court specifically directed Plaintiffs to explain what they contend constitutes a "material error subject to remediation." (Doc. 152 at 7.) Instead of responding, they attempted to shift the burden elsewhere, (Pls.' Mot. for Affirmative Relief (Doc. 156) at 17-19), and offered a litany of their preferred processes, (id. at 10-13). This failure to explain why the requested relief is required by Due Process mandates denial of the motion.

Second, none of the Exhibits filed by Plaintiffs allege facts to explain harm caused to any Plaintiff by the original Memo 2020-19. (See Docs. 148-1 thru 148-15.) Plaintiffs submitted the declaration of Talia Ray, a paralegal for Plaintiffs' counsel, describing the confusion of various county boards of election. (Doc. 148-16 at 3-7.) However, their

confusion demonstrates the problems caused by Plaintiffs' delay in seeking further relief from this court in a timely fashion, as well as the SBE's late change to the original Memo 2020-19.

The Purcell principle applies to Legislative Defendants' request: federal courts are to avoid active interference in election rules too close to a state election. As Plaintiffs point out, Purcell suggests that this court ought not directly order the SBE to follow any particular set of election rules. (Pls.' Mot. for Affirmative Relief (Doc. 156) at 26-27.)[9] Enjoining only the SBE's removal of the witness requirement, rather than the entirety of the Revised Memo, allows the court to follow Purcell and refrain from unnecessary interference with election procedures, while still requiring compliance with its prior injunction. Therefore, this court will, without prejudice, deny Legislative Defendants' request that it "order the NCSBE to

[9] The injunction this court has chosen remains within the scope of this court's August Order, which specifically upheld the witness requirement while prescribing the need for further Due Process. This court finds an injunction pursuant to the AWA is necessary on these facts. Further injunctive relief would not be appropriate in this case under the AWA because the Revised Memo, other than the elimination of the witness requirement, does not implicate any of the affirmative relief ordered in the August Order. Those issues – including the ballot receipt deadline, drop-box cure procedure, and the postmark requirement changes – will be addressed directly in the Moore and Wise cases.

return to the guidance contained in its August Memo." (Leg. Defs.' Resp. (Doc. 150) at 10.)

III. CONCLUSION

For the foregoing reasons, this court finds Defendant-Intervenors' motion for All Writs Act relief should be granted in part and denied in part. This court will enjoin the SBE from implementing a Due Process or 'cure procedure' as described in Revised Memo 2020-19 which authorizes acceptance of an absentee ballot without a witness or assistant signature, (Doc. 143-1 at 2.) This injunction prohibits use or implementation of the process allowing "witness or assistant did not sign" to qualify under "Deficiencies Curable with a Certification," (id.), which would otherwise approve an absentee ballot which has not been executed in accordance with H.B. 1169. Plaintiffs' motion for Affirmative Relief should be denied.

In the absence of any binding precedent of the Supreme Court or the Fourth Circuit Court of Appeals, it remains possible that an appeal is ultimately taken from this court's finding that Due Process applies to the rejection of absentee ballots as explained in this court's August Order. (See Doc. 124 at 150-59.) Upon appeal, a higher court may disagree with this court's conclusions regarding Due Process in the form in which they are applied here. See, e.g., New Georgia Project v.

Raffensperger, ____ F.3d ____, 2020 WL 5877588, at *3 (11th Cir. Oct. 2, 2020) ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point."). Recognition of that possibility makes it even more disturbing that the SBE would put forth this court's August Order as legal authority upon which a North Carolina court should act to approve eliminating or modifying the state statutory witness requirement, as well as related requirements for execution of an absentee ballot. Even if the relief ordered by this court is found at some future time by a higher court to be inappropriate, this court would still issue the injunction chosen here. Under no circumstances was the Due Process remedy ordered by this court intended to eliminate the state's statutory requirements for marking a ballot when voting absentee, and the August Order should not have been used as authority for such action.

IT IS THEREFORE ORDERED that Defendant-Intervenors' Motion for All Writs Act Relief, (Doc. 154), is **GRANTED IN PART AND DENIED IN PART**. The motion is **GRANTED** with respect to the witness requirement cure procedure implemented in Revised Memo 2020-19; the motion is **DENIED WITHOUT PREJUDICE** as to consideration of relief also requested in 1:20CV911 and 1:20CV912.

IT IS FURTHER ORDERED that the North Carolina State Board of Elections is hereby **ENJOINED** and **PROHIBITED** from implementing a Due Process or 'cure procedure' as described in Revised Memo 2020-19 which authorizes acceptance of an absentee ballot without a witness or assistant signature, (Doc. 143-1 at 6.) This injunction prohibits use or implementation of the process allowing "witness or assistant did not sign" to qualify under "Deficiencies Curable with a Certification," (Doc. 147 at 2-4), which would otherwise approve an absentee ballot which has not been executed in accordance with H.B. 1169. This injunction does not extend to other minor, curable errors subject to remediation such as a witness signature written on the wrong line or an incomplete address.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Affirmative Relief, (Doc. 156), is **DENIED**.

This the 14th day of October, 2020.

William L. Osteen, Jr.
United States District Judge

STATE OF NORTH CAROLINA COUNTY OF WAKE	)	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
	)	
	)	CASE NO. 20 CVS 8881
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; AND CAREN RABINOWITZ, PLAINTIFFS, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, *Chair of the North Carolina State Board of Elections*, DEFENDANTS, *and* PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; *and* TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*, INTERVENOR-DEFENDANTS.	)	**AFFIDAVIT OF LINDA DEVORE**

I, Linda Devore, hereby declare under penalty of perjury, that the following information is true to the best of my knowledge and state the following:

1. I am over 18 years old. I am competent to give this declaration. I am providing this declaration based on my personal experience and in my personal capacity.

2. I currently serve as Secretary of the Cumberland County Board of Elections. My term on the Cumberland County Board of Elections began on March 1, 2019. I have

served on the Cumberland County Board of Elections throughout the past five elections. I have twice attended the Cumberland County Board of Elections training for Poll Workers, in addition to North Carolina Board of Elections training for county board members in July 2019, February 2020, and August 2020, and online training modules in May 2020.

3. North Carolina held primary elections in early March 2020 before the public health emergency and state emergency orders were implemented in our state. As a result, our county was able to complete our primary election work under non-emergency conditions, and our county and state have had the luxury of six months to plan and prepare for running an election that accommodates voting during a pandemic. The North Carolina legislature was able to consider and pass House Bill 1169, which provides a number of pandemic acommodations for the upcoming presidental election. With one exception for a limited number of counties that had a June primary this year, as a state we were never placed in the position of many other states who were required to develop pandemic plans on short notice, and staff polling sites when little was known or understood about the coronavirus or the risks for workers and voters, and while PPE was far less available than it is now.

Expanding Early Voting Days

4. While I am confident my county will have enough poll workers for this election, given the concern of some of our seasoned workers who have increased risk if they contracted coronavirus, and the need for additional workers to sanitize surfaces between voters, offer masks and hand sanitizer, and manage larger spaces at Early Voting

sites, it has been a challenge to recruit and train enough new workers to meet our goal of increasing staffing at each current Early Voting and Election Day site. I believe it is unrealistic to think that we would be able to meet our staffing goals and provide all of the safety measures we have planned for in-person voting if additional days, up to and including additional days of Early Voting were allowed particularly at this late date with Early Voting set to commence on October 15th.

5. Our staff members have been working to mitigate in-person voter risks and concerns by redesigning polling site check-in areas, providing distancing between voting booths at all polling sites, increasing the number of Early Voting sites, and moving some to larger spaces. We have relocated five Election Day precinct polling sites to nearby sites with larger spaces to fully accommodate distancing for voters and precinct officials. We have moved into larger spaces within over a dozen public schools, fire stations, and churches used as polling sites on Election Day to improve voter flow and minimize lines.

6. We have made all in-person voting safer and more accessible. Hours for Early Voting in Cumberland County at all of our 12 sites are 8:00 a.m. to 7:30 p.m. Monday through Friday. Weekend hours are 8:00 a.m. to 3:00 p.m. on all three Saturdays and 1:00 to 5:00 p.m. on the two Sundays. This is more sites, days, and hours than we have ever offered in Cumberland County, and we are grateful for CARES ACT funding that allows us to staff this amount of hours at twelve sites for this election. Our hours and sites exceed the State Board requirement of one site per 20,000 voters and 11 hours on weekends, and I believe we are providing more than adequate capacity to avoid long lines and permit

social distancing, especially given the unsually large number of voters requesting Absentee Ballots this election, which will impact the number of voters voting in person.

7. We have added sites and hours near traditionally busy early voting sites to spread out voters and avoid congestion at all sites. Eleven of our twelve Early Voting sites are public recreation centers, where we will have ample space to respect distancing for voters by placing booths six feet apart. Two former sites that did not have sufficient space for adequate distancing with the number of voting booths needed were replaced with recreation center sites.

8. Staff and Board Members began surveying sites months ago. All of our county recreation centers, libraries, and public buildings were identified and assessed for size and accessibility. Only those that are too small for distancing or present accessibility issues were not considered.

9. Each Early Voting site selected is large, accessible, and geographically distributed throughout the county following population densities. None of our Board Members nor staff recommended consideration of sites that are not included in our plan, or that more sites be included. Our decision to expand to twelve sites was not constrained by budget since they are public buildings, and the increased staffing for the additional sites, hours, and pandemic accommodations were possible from CARES ACT funds. Our guiding principle was accessibility and safety for our workers and voters. Our plan was unanimous. None of our Board members expressed a concern with lack of access or capacity for early voting with our adopted plan.

10. Historical early voting data in our county shows that our early voting sites are most heavily utilized by voters during the first short week and the last full week of the 17-day early voting period. Voting numbers are low during the middle week. I believe this data demonstrates that we are not lacking in the number of days of early voting to meet demand. Therefore, our plan is designed around adding more and larger capacity sites in areas of the county that have historically voted heavily during the early voting period. Based on the data, I believe this approach will prove more effective at avoiding congestion and long lines than would additional days.

Witness Requirement and Ballot Harvesting

11. On August 21, 2020, our State Executive Director provided guidance to all County Boards on the Absentee Ballot Process, specifically in Numbered Memo 2020-19, to provide uniformity and consistency in reviewing and processing Absentee Ballots and Return-Envelope Deficiencies. This guidance included a section entitled "No Signature Verification," which instructed counties that "County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter . . . The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. Verification of the voter's identity is completed through the witness requirement."

12. This guidance makes clear that the reason we will not be required to compare signatures is that the witness requirement is being used to verify the voter's identify. If any Absentee Ballots were not required to have a witness signature, it seems clear we would need to compare that voter's signature with their registration record to verify the voter's identity.

13. However, on September 22, 2020, after voting for the upcoming election had already started, the State Board published Revised NM 2020-19, which states that "The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law."

14. Revised Numbered Memo 2020-19, also allows Absentee Ballots received without a witness signature to be cured by a Cure Certificate. The Cure Certificate requires only that the voter affirm that they voted their ballot, and eliminates the requirement of a witness signature. In addition, guidance in the original Memo 2020-19 that verification of the voter's identity is completed through the witness requirement, has been eliminated in the September 22, 2020 Revised Memo. What we are left with is a voter signature being verified by another signature of the same person affirming their own signature.

15. By directing County Boards to accept Absentee Ballots with such a Cure Certificate without any witness signature, and forbidding them any means of verifying the voter's signature, the County Boards of Elections, and the Absentee Ballot process in North Carolina, is left without any ability to protect the integrity of the election process, and in fact, encourages abuse of the Absentee process.

16. While voter assistance in completing an Absentee Ballot Request Form and marking the Ballot is restricted to a near-relative or guardian, there is no restriction on who may assist with a Cure Affidavit, thereby opening up the opportunity for the very practice of ballot harvesting that the North Carolina Legislature intended to protect against with legislation in 2019 after the Bladen County harvesting that required a new 9th District Congressional election was discovered. This statement from the Bench Memo presented at the September 15, 2020, meeting of the State Board confirms this concern: "We are aware, for example, that the NC Democratic Party has created an online tool to allow a voter to complete and submit the cure affidavit using an online link."

17. While the North Carolina legislature has sought to protect against ballot harvesting by requiring that the identity of voters requesting Absentee Ballots be kept confidential until the ballot is received by the County Board, that information becomes public when a deficient ballot is returned. The information that is publicly released includes information on any ballot that contains a deficiency, and what the deficiency is. This alone provides an open opportunity for ballot harvesting, but combined with allowing a Cure Certificate for failing to comply with the Witness Requirment and an online portal that is not restricted to near-relative assistance, the risk to election security in North Carolina becomes immense.

18. Eliminating the witness signature was a suggestion by our State Board Executive Director that was rejected by the North Carolina Legislature with the adoption of HB1169. Revised NM 2020-19 therefore fails to provide the protection clearly intended by North Carolina's elected legislative body under this statute.

19. On September 28, 2020, our County Board began notifying voters whose Absentee Ballot was missing a witness signature, or had any witness deficiency, that their ballot could be cured with a Cure Certificate. We mailed letters with this information to over 400 voters that day. This information is in contrast to the letters mailed to votes whose Absentee Ballots were received before September 22, 2020, with a witness deficiency of any kind. Before September 28, 2020 voters were notified that their ballot had been spoiled and were mailed a new Absentee Ballot. Hundreds of voters in our county were mailed new Absentee Ballots before September 22, 2020, as a result of witness deficiencies.

20. On September 29, 2020, our Board met for our first Absentee Meeting of this election, and we were presented an Absentee Ballot without a witness signature with an accompanying Cure Certification signed by the same person. The voter had visited our office the day before, September 28, 2020, the same day the letters and Cure Certificates were first mailed, so she had not yet received a letter providing the Cure Certificate. She came in person to our office, and requested a Cure Certification. She reported to our staff that she had heard of the new cure process, and specifically asked for a new Cure Certificate that would allow her to cure her deficient Absentee Ballot with only her signature. This example makes clear that there was no effort whatsoever to comply with the Witness Requirement, and no reason this same voter could not have voted in person as an alternative to obtaining a witness.

21. The public concern for ballot harvesting activities, such as those in counties nearby Cumberland that tainted elections in 2018 and resulted in a new 9th Congressional district election as well as local elections in Bladen and Robeson counties, has not changed.

Our Board members have discussed this concern in our meetings on several occasions, and our Director has explained the vigilance of our staff to assure that the election fraud in neighboring counties does not take place in our county. The public is increasingly concerned that voters may be robbed of their right to vote free of undue influence, coercion, or intimidation. A 2016 investigation in neighboring Robeson County was initiated when it was discovered that one or more "harvesters" had visited an assisted living facility and "assisted" residents with diminished cognitive function and dementia with their ballots. At least one elderly resident, whose adult son discovered the fraud and reported the activity, was "assisted" to change her party affiliation and vote without being aware that she had done either. In 2019 the North Carolina legislature passed new election laws to protect against ballot harvesting that, among other things, provides that lists of voters who have requested Absentee Ballots remain confidential until Election Day. This law is intended to prevent ballot harvesters from knowing the identity and address of those requesting Absentee Ballots, and then tracking the ballots as they are received by voters. But if individuals working on behalf of political parties or candidates, or third party organizations who pre-fill and mail tens of thousands of ballot request forms into a state, are allowed to "assist" in preparing Absentee Ballot Requests and can "assist" in filling out Cure Certifications, they do not need a public list of who has requsted an absentee ballot. They know who they have assisted, and where they live, which is most often in public housing, group homes, and other places where vulnerable and sometimes disinterested voters are easily accessed and influenced through coercion, intimidation, or a "friendly" conversation

that advises the voter while executing their ballot, especially in down-ballot races that the voter may well be unfamiliar with.

22. Voters have a right to expect the same privacy in completing their Absentee Ballot as they have in the voting enclosure during in-person voting. Only a near-relative, guardian, or Multi-partisan Assistance Team (one member from each major political party), because they are expected to act in the best interests of the voter, is trusted under North Carolina law to respect the voter's intention to vote for the candidates of their choosing. Even near-relatives, guardians, and MAT members are only allowed to physically assist a voter, and not direct or assist in deciding who to vote for. Assistance by those who exert undue influence, especially to vulnerable populations who are most likely to accept assistance, has proven unreliable and results in loss of franchise for the voter.

Ballot Reciept Deadline

23. During State Board training for staff and county board members held virtually on August 4th and 5th of this year, there was discussion and focus on preparing each county for the new volume of absentee voting, and the additional resources counties need for incorporating the pandemic accommodations and increased demands on the absentee ballot processing, including the Intelligent Mail Barcoding system through BallotTrax, which allows the counties and voters to know where a ballot is after mailing. This system is expected to significantly increase voter confidence in the mail-in voting process, as well as lessen the demand on county staff from voters contacting the Board of Elections, wanting to confirm the status of their ballot. If a bottleneck develops in the

delivery of ballots to voters or the return of ballots to the Board of Elections, the issue will be known in real-time and can be addressed. Therefore, the opportunity for ballots to be caught up in the USPS system, and arrive later than the third day after Election Day, if they are mailed on time, has been significantly reduced.

24. The expectation of significant increases in Absentee Ballot Requests manifested itself as the State Board and Cumberland County reported record high request numbers each week over the summer months, resulting in over 600,000 Absentee Ballots successfully mailed on September 4, 2020, from the 100 county Boards of Elections in North Carolina. The additional planning and resources provided by the State, and implemented by our county staff over the previous few weeks, allowed Cumberland County to mail nearly 15,000 Absentee Ballots on September 4th, including all requests received through that date. This is five times the number of Absentee Ballots received in the last presidential election. Nevertheless, in a county of nearly 100,000 households, it is not a significant number of mail pieces for the USPS to handle. Many, if not all, of the Absentee Ballots mailed via USPS on September 4th were received by voters in our county the following day, Saturday, September 5th.

25. Monday, September 7th was a holiday without mail delivery, however, 1200 Absentee Ballots were returned back by to the Cumberland County Board of Elections by voters in the four remaining business days of the week—up through and including September 11th, indicating that the USPS is processing and delivering ballots in a timely manner—and in numbers unlikely to impact a mail delivery system processing hundreds of thousands of mail pieces each day in our county.

26. Over the past five elections in Cumberland County, a county of over 200,000 registered voters, I recall about a dozen Absentee Ballots arriving after Election Day that could not be accepted under North Carolina law because they did not arrive within the time allowed by statute. However, I know of none postmarked by Election Day, that did not arrive within the three-day statutory period allowed. This year even more emphasis has been placed on communicating to voters the importance of mailing early—and ballots are being requested very early in record numbers. Our Director and Board Members have been, and continue to, communicate through civic groups, local radio, and print media about mailing early.

27. Because the filing period for Cumberland County Board of Education candidates did not close until the first week of August, it was necessary for Cumberland County to use ballot-on-demand to print Absentee Ballots for mailing on September 4th, while some smaller counties with fewer ballot styles may have been able to receive pre-printed ballots in time for the September 4th mailing. The timeline for Cumberland and other counties printing the ballots this year did not begin until the first week of September, yet Cumberland County was able to print and mail nearly 15,000 ballots in one week, from requests that accumulated over the summer months. Based on this experience, we expect that keeping up day to day with new Absentee Requests from now through Election Day will place less stress on our Absentee process than what we have already seen.

28. Based on the staffing, training and experience in place, our County fully expects to consistently process Absentee Ballots requests on a one or two day turnaround, including notification in the case of defective requests, and defective ballot envelopes. The

additional workers trained during the past few weeks to process requests have gained experience, and we expect we will operate even more efficiently as we continue the process throughout September and October. Based on our experience with the 15,000 ballots mailed on September 4th, and the expectation of meeting the State Board guideline of mailing a ballot to the voter within one or two business days, it seems clear that for any Absentee Ballot Requests received by the statutory deadline on October 27th, a ballot will be mailed to the voter by the 28th or 29th, and reach voters in time for them to execute and mail their ballot by Election Day on November 3rd.

29. The Cumberland County Board of Elections has scheduled 18 Absentee Meetings beginning September 29, 2020 and continuing through Election Day. Cumberland County typically handles considerably more than a thousand provisional ballots during presidential elections, primarily due to our large and very mobile population of military families stationed at Ft. Bragg. Provisional ballots individually require significant staff research time, and this work is done after Absentee Ballots are received and processed, and before Canvass. It is the practice of our Board to complete our Absentee process as soon as possible in order to shift our staff to the significant number of provisional ballots that require research and Board discussion. Extending the date for receiving Absentee Ballots after Election Day is likely to encourage voters to wait later to mail their ballots, and not only risk them not being postmarked by Election Day depending on where they are deposited, but burdening staff with an unsually large number of later arriving ballots to process after Election Day when time is needed for provisional work, updating voter histories, precinct audits—and this year, cure affidavits by voters who failed to sign

their ballot envelope. Preparing for Canvass in a presidential election is always an intense time.

30. If County Boards are required to accept Absentee Ballots received up to 9 days after Election Day without a postmark, with the expectation that Boards will be able to research such late-arriving ballots to determine the date each ballot was deposited with any carrier, the impact on preparing for Canvass will be disruptive. If the date to receive Absentee Ballots without a postmark is extended to 5:00 PM the day before Canvass, County Boards would be required to notify a voter of a ballot received as little as 18 hours before Canvass, and expect the voter to produce proof of a deposit date by 11:00 AM the next day. The risk of creating a delay in the North Carolina Canvass process, in order to provide a reasonable time for the voter to respond, seems almost inevitable.

31. County staffs are just now becoming familiar with the BallotTrax system that went live on September 11, 2020, and is being used for the first time in North Carolina to track ballots mailed and returned through the USPS. There are many and various other delivery systems that a voter could use to deliver a ballot, and each has its own tracking mechanism. It is unclear how County Boards would have universal access to the tracking of a ballot deposited by a voter, or by what means the voter would verify the deposit date of their particular ballot.

Absentee Ballot Drop Off

32. In Cumberland County we log in Absentee Ballots that are delivered to the Board of Elections office or at an Early Voting site by providing a drop-off form to the

person presenting the Absentee Ballot. The one-third page forms have been printed in pads, and allow each person dropping off to complete the same information required by the log-in process, but does not require the voter to wait in line behind others while they provide their information. The drop-off window is manned by a staff member dedicated to accepting Absentee Ballots, and that person tears off a form and hands it to the person dropping off. The form is completed before the staff person accepts the ballot. It is an efficient drop-off and log-in system that minimizes wait time for the person bringing a ballot, and allows multiple persons to be served at one time. On a recent day in our Board of Elections lobby we had 8-10 people filling out their drop-off forms, while distancing from each other, and with little to no conversation with the staff person manning the drop-off station, thus nearly eliminating the opportunity for virus transmission. Knowing that the virus is transmitted through the air we breathe, especially when speaking with another person face to face or in close proximity, we are convinced that our process serves the interests of public health far more effectively than the State Board guidance provided in Revised Numbered Memo 2020-23 that requires the staff member and the person dropping off to engage in a conversation to provide information that can more efficiently and effectively be provided in writing by the voter or near-relative. Single-use pens are available, or the person dropping off may use their own. Requiring all counties to adopt a standard process that is inferior to what they may already have implemented does not allow for best practices.

33. Prior to Labor Day weekend, and before our Board began mailing Absentee Ballots on September 4th, our office was closed to walk-in traffic. Therefore, we installed

a small drop box outside our front door that allowed voters to deposit voter registration forms and Absentee Ballots Requests forms. This drop box was removed when our office re-opened after the Labor Day weekend, with a plexi-glass screen for walk-up traffic, and a staffed and dedicated plexiglass protected desk for receiving Absentee Ballots. We have been operating our Absentee drop-off desk during regular business hours in this manner since the day after Labor Day when Absentee Ballots were first returned, and it has been well-received by the public. We have experienced no congestion or long lines. This allows us to properly document who is deliverying the Absentee Ballot, as required under North Carolina, while efficiently accepting Absentee Ballots at our office. We have received thousands of Absentee Ballots in this manner during the past three weeks. Our county Director advised us that continuing to have an unmanned drop box outside our front door after Absentee Ballots were mailed would jeopardize our ability to monitor compliance with North Carolina law for ballot delivery, so we developed a simple process that is both efficient and convenient without compromising ballot security.

Voter Assistance

34. Our Director is in the process of recruiting and training workers for MATs (Multi-partisan Assistance Teams). MATs are authorized under North Carolina law to provide physical assistance to disabled or elderly Absentee Voters when a near-relative or guardian is not available. The MAT members help voters read and understand instructions, and assist with any physical limitations of the voter, such as poor vision or limited use of fingers and hands, that hinders them from completing their ballot. We typically have 3-4

teams available during a presidential election to assist elderly or disabled voters, mostly in group living facilities, with registration, Absentee Requests, and Absentee Ballots. This year under pandemic conditions, we are planning to train ten MATs , so that we will have MATs available to also assist any homebound voter who is unable to obtain physical assistance from a near-relative or guardian authorized to provide this assistance.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed this 30th day of September, 2020.

Linda Devore

State of North Carolina

County of Wake

Subscribed and sworn to (or affirmed) before me Cynthia Fabian Medina on this 30th day of September, 2020 by Linda Devore.

I signed this notarial certificate on September 30th, 2020 according to the emergency video notarization requirements contained in G.S. 10B-25. The Notary Public was located in Wake County during the emergency video notarization and the principal signer stated they were physically located in Cumberland County during the emergency video notarization.

Cynthia Fabian Medina
Notary Public

My commission expires on 05/03/2022.

CYNTHIA FABIAN MEDINA NOTARY PUBLIC DURHAM COUNTY MY COMMISSION EXPIRES 05/03/2022 NORTH CAROLINA