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FEMA

President Donald J. Trump Approves Major Disaster Declaration for North Carolina

Release Date	Release Number
March 25, 2020	HQ-20-026

WASHINGTON — FEMA announced that federal emergency aid has been made available for the state of North Carolina to supplement the state, tribes and local recovery efforts in the areas affected by the Coronavirus Disease 2019 (COVID-19) pandemic beginning on January 20, 2020, and continuing.

Federal funding is available to state, tribal, and eligible local governments and certain private nonprofit organizations on a cost-sharing basis for emergency protective measures (Category B), including direct federal assistance under Public Assistance, for all areas affected by COVID-19 at a federal cost share of 75 percent.

Gracia B. Szczech has been named as the Federal Coordinating Officer for federal recovery operations in the affected area. Additional designations may be made at a later date if requested by the state and warranted by the results of further assessments.

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FEMA's mission is to help people before, during and after disasters.

Follow FEMA online, on Twitter @FEMA or @FEMAEspanol, on FEMA's Facebook page or Espanol page and at FEMA's YouTube account. Also, follow Administrator Pete Gaynor's activities @FEMA_Pete.

Tags: Headquarters North Carolina Coronavirus Pandemic

Last updated July 23, 2020

Tags: Headquarters North Carolina Coronavirus Pandemic

Last updated July 23, 2020

The Washington Post
Democracy Dies in Darkness

Key swing states vulnerable to USPS slowdowns as millions vote by mail, data shows

Battlegrounds that may decide the presidency have some of the nation's most erratic mail service, which has particular implications for states with firm ballot deadlines

By **Jacob Bogage** and **Christopher Ingraham**

Oct. 20, 2020 at 12:52 p.m. EDT

Key swing states that may well decide the presidential race are recording some of the nation's most erratic mail service as record numbers of Americans are relying on the U.S. Postal Service to deliver their ballots, agency data shows.

Consistent and timely delivery remains scattershot as the mail service struggles to right operations after the rollout, then suspension, of a major midsummer restructuring. In 17 postal districts representing 10 battleground states and 151 electoral votes, the average on-time delivery rate for first-class mail is 83.9 percent — 7.8 percentage points lower than in January and nearly two points below the national average. By that measure, more than 1 in 6 mailings arrive outside the agency's one-to-three-day delivery window.

The slowdowns, which have raised alarms and suspicions among voters, postal workers and voting experts, have particular implications for states with strict voter deadlines. Michigan, Wisconsin and Georgia, for example, do not accept ballots that arrive after Election Day, regardless of the postmark. Of the states that do, there is generally a short qualifying window: In North Carolina, where polls have President Trump and Democratic nominee Joe Biden in a dead heat, postmarked ballots must arrive within three days of the election.

"There are fundamental and foundational issues with the Postal Service that go beyond voting, and there are issues with election administration that we can address," said David Becker, executive director of the nonpartisan, nonprofit Center for Election Innovation and Research. "But the rules we have for the next 14 days are the rules we have."

There are always variabilities in the mail, he said. "There have always been states that have firm deadlines after which no more ballots will be accepted. There has always been an element of voter responsibility along with responsibility of election officials and the Postal Service. And voters are embracing that responsibility."

In Detroit, where Democrats are relying on heavy turnout to carry the rest of Michigan, only 70.9 percent of first-class mail was on time the week that ended Oct. 9, compared with 92.2 percent at the start of the year.

In Wisconsin — which struggled mightily with a vote-by-mail primary in August — on-time delivery fell to 84.3 percent in the Lakeland district, which encompasses most of the state. In North Carolina's Greensboro district, which includes Raleigh and Durham, service was 10.1 percentage points lower than it had been in January. Timeliness also varied widely in postal districts in Pennsylvania and Florida.

Postal Service spokesman David Partenheimer said the agency has maintained performance standards despite surging

mail volumes and challenges related to the coronavirus pandemic. The agency had made an estimated 64 million ballot deliveries — to and from election offices — through Oct. 7, agency data shows.

“The Postal Service is fully committed and actively working to handle the increase in election mail volume across the country over the next two weeks,” he said in an emailed statement to The Washington Post, adding that extra staffing and resources have been allocated to help process and deliver election mail.

Workers have been instructed to use “extraordinary measures” to accelerate the delivery of ballots, he wrote. Those measures include expedited handling, special pick-ups, and extra and Sunday deliveries.

But some postal workers say ballot-handling directives from higher-ups have been chaotic. Letter carriers in Michigan say supervisors press them to focus on package delivery toward the end of their shifts, leaving ballot collection lower on the priority list. In Pennsylvania, clerks are preparing to hand-stamp ballot envelopes in the final stretch of the 2020 campaign, to steer them away from overwhelmed processing plants.

Though government officials and election experts say municipalities have made great strides in preparing for the Nov. 3 election, mail service remains a key variable given that 198 million Americans are eligible to vote by mail. Postal leaders are scrambling to build confidence in an agency that has been maligned as a “joke” by Trump, was forced to suspend a major cost-cutting agenda and told 46 states and the District of Columbia that their election regulations were “incongruous” with mail service.

The Postal Service data reveals an agency fighting to stabilize itself before a final influx of ballots, as well as the holiday season’s onslaught of packages, greeting cards and catalogues.

“In the current state of the world, there is nothing a voter could do to work around problems in the post office,” said J. Remy Green, an attorney who represents a group of voters in a lawsuit against the Postal Service in federal court in the Southern District of New York.

“I think at the end of the day, the damage that has been done here, it’s not just service performance and quantifiable damage,” Green said. “It is a kind of psychic damage to the confidence of voters and confidence in the vote.”

According to a Washington Post-University of Maryland poll conducted by Ipsos in late August, 34 percent of registered voters said they were not confident their vote would be counted correctly if submitted by mail. And 37 percent were only “somewhat” confident. More than 60 percent of respondents said they had never before voted by mail.

A representative from the Trump campaign declined to comment. The Biden campaign did not immediately respond to a request for comment.

The Postal Service began the year moving 91.8 percent of all first-class mail on time — below its internal goal of 95 percent but within the realm of reliable service. The national rate hovered in the low 90s until mid-July, roughly a month into the tenure of Postmaster General Louis DeJoy, a former supply-chain logistics executive and major Trump financier who implemented a stricter transportation schedule that banned late and extra deliveries, and other cost-cutting measures.

Meanwhile, regional vice presidents and local managers were instructed to cut hours among a 630,000-member workforce already flattened by the pandemic. The Postal Service also mothballed nearly 700 high-speed mail-sorting machines and removed more than 1,500 public collection boxes, moves the agency says were planned before DeJoy’s

arrival.

The postmaster general suspended those moves in August after public and congressional pushback, but he declined to replace machines already disconnected (many had been trashed or scrapped for parts) or replace the collection boxes. The Postal Service maintains it has ample capacity to process election mail.

But postal workers say those changes have made their jobs more difficult and contributed to the delays. Mail is no longer sorted locally — instead items are sent to centralized processing facilities that cover larger geographic areas — making late and extra trips crucial components of timely delivery. Fewer sorting machines means more mail is hand-sorted, which is time-intensive and has a greater margin of error. It also means mail can sit around longer before processing.

Still, on-time service has improved since early August, after DeJoy suspended his changes and after seven federal courts intervened on behalf of 19 states and voters groups. Judges in New York, Pennsylvania, Washington state and D.C. ordered the Postal Service to authorize late and extra trips to deliver election mail, including ballots, ballot applications and voting information.

The Postal Service, though, continues to struggle with issues that are independent of but were exacerbated by DeJoy's policies, according to postal workers and logistics experts.

The front lines remain understaffed and rely heavily on overtime hours to accomplish basic tasks. During the summer, employees routinely worked 60 hours or more per week, say workers and organized-labor leaders. Now, as the holidays approach and the Postal Service grapples with surging package volumes, overtime hours have soared.

The agency recorded 3.3 million overtime hours, or 21.1 percent of all work hours, during the week of Oct. 15, according to documents filed in the Pennsylvania lawsuit. Overtime hours typically make up 10 to 13 percent of all hours within a two-week pay period.

Though election mail and packages are processed on separate machines, they still funnel out to individual carriers for delivery, leaving the agency to decide which has priority.

The Postal Service has a vested interest in both. Ballots are profitable because municipalities cover the cost if they are mailed without postage, while packages are a core and growing part of the service's finances.

Postal workers say that tension is clear in Michigan, especially in Detroit's suburbs. Letter carriers say they receive messages daily telling them to prioritize packages — which often have guaranteed delivery windows — over other items, including election mail. Carriers have taken to sorting through their satchels mid-route to pull out ballots and pieces of voting information so they can prioritize them on their own, according to two letter carriers who spoke on the condition of anonymity to avoid retribution.

The frequency of mail delivery also varies widely by Zip code, even on postal routes within minutes of one another. In facilities that serve Detroit's mostly White suburbs, staffing has remained steady, the workers said, and residents can expect delivery daily. If a piece of mail is late, they said, it will probably arrive the next day.

But in more racially diverse neighborhoods, they said, mail delivery typically occurs twice or three times a week unless

But in more racially diverse neighborhoods, they said, mail delivery typically occurs twice or three times a week unless a parcel is in the mix.

“I walked around a little bit — it was a mess in there,” one of the letter carriers said of a post office that serves Detroit. “There was mail everywhere. And not mail everywhere in the sense that carriers come in the morning and 'This is my route for the day. I’ve got to [sort] this up and get out of here.’ This was mail everywhere because no one is there to carry that mail.”

The Detroit postal district extends 130 miles north and 110 miles west, covering about a quarter of the state and including communities with predominantly Black populations. It also had the worst mail service in the country the week that ended Oct. 9. Meanwhile, the Greater Michigan district — which covers the rest of the state, and rural areas that helped deliver the state to Trump in 2016 — was in line with the national average, and 16 percentage points better than Detroit.

Simple awareness of the delivery issues is one of the best ways to protect mailed ballots, said Christopher Thomas, a fellow at the Bipartisan Policy Center think tank who was Michigan’s longtime director of elections.

“There might be a little faith in the postal system in the sense of the pressure being on right now for them to handle election mail,” Thomas said. “It’s distinctive mail for them to see and pull out. And people who live in those areas know that their mail is not dependable. The hope is that they know not to test that out.”

Most of Wisconsin is contained in the Lakeland postal district, where mail service is 6 percentage points below January levels. Voters have requested 1.4 million ballots, nearly half of the 3 million that state residents are projected to cast. They have already returned 61.4 percent of those ballots, a rate that dwarfs the national average of 22.7 percent, according to the United States Elections Project.

Mail service in pockets of Florida and Pennsylvania also could prove decisive.

Without Florida and its 29 electoral votes, Trump’s path to 270 electors is exceedingly difficult. In the heavily Democratic South Florida district, mail service is the worst in the state, at 82.8 percent. In the Gulf Atlantic district, which includes the northern cities of Jacksonville, Tallahassee and Pensacola, delivery stands at 83.4 percent. The Suncoast district, which includes Orlando, features some of the most heavily conservative areas in the state. Its delivery rate is 88.1 percent, down from 90.9 percent at the start of the year.

The unpredictable mail service, coupled with Florida’s firm election-night cutoff for ballot delivery, has labor leaders worried.

“Everything has been running differently between the three districts. There’s no consistency,” said Al Friedman, president of the Florida State Association of Letter Carriers. “You knew this election was coming four years ago. You knew the amount of political mail was going to be the worst. You predicted this in May — the worst year for political mail ever. And you didn’t plan.”

Mail service in Pennsylvania similarly varies by region, with better and more consistent results recorded in areas that are primarily rural, suburban and conservative.

The Western Pennsylvania district, which encompasses Pittsburgh and its suburbs and exurbs, traditionally has some of the best on-time rates in the country. The on-time rate of 89.4 percent exceeds the national average. The Central

of the best on-time rates in the country. The on-time rate of 89.4 percent exceeds the national average. The Central Pennsylvania district, a Republican stronghold, has an 83.2 percent on-time rate.

But the Philadelphia Metro district, which Democrats need to dominate to offset GOP votes in the rest of the state, is one of only six districts in the country with on-time service below 80 percent. Staffing shortfalls remain a chronic issue, according to postal employees in the state. In Philadelphia, workers are preparing to cull ballots, process them by hand and deliver them to local election officials to avoid having to send them to regional processing plants, where the sorting system moves slower.

"It's hard to tell a voter with certainty," said David Thornburgh, president of the local good-government group Committee of Seventy, "how long it will take the post office to deliver their ballot."

Updated October 9, 2020

Voting in the 2020 U.S. Election

What you need to know: How to make sure your vote counts in November | Absentee ballots vs. mail-in ballots | How to track your vote like a package | How to prevent your mail ballot from being rejected | Where Biden and Harris stand on voting issues | Google allows ads with 'blatant disinformation' about voting by mail

U.S. Postal Service: USPS on-time performance dips again as millions prepare to mail 2020 ballots | Chronic USPS delays in Detroit undermine voters' confidence in voting by mail | Postal Service backlog sparks worries that ballot delivery could be delayed in November | Why the USPS wanted to remove hundreds of mail-sorting machines | Can FedEx and UPS deliver ballots? | Newly revealed USPS documents show the agency's 2020 ballot pressures, uncertainty

Map: Which states can cast ballots by mail

Are you running into voting problems? Let us know.

N.C. Absentee Ballot Requests for 2020 General Election

Published 10/23/2020

Includes data through 10/22/2020

Contents:

· Total Number of Requests

· 2016 General Election Comparison

· Table 1. Number of Requests by Voter Party Affiliation (2020)

· Table 2. Number of Requests per County (2020)

· Table 3. Number of Requests per County, by Voter Party Affiliation (2020)

Total Number of Requests: **1,420,665**

Number of requests received through 10/22/2020 (12 days before election)

2016 General Election Comparison

Total number of requests this time in 2016: **220,058**

Number of requests received through 10/27/2016 (12 days before election)

Table 1. Number of Requests by Voter Party Affiliation (2020)

Party	Requests
CONSTITUTION	473
DEMOCRATIC	656,659
GREEN	903
LIBERTARIAN	6,564
REPUBLICAN	278,495
UNAFFILIATED	477,571
Grand Total	**1,420,665**

Table 2. Number of Requests per County (2020)

County	Requests
ALAMANCE	21,709
ALEXANDER	2,451
ALLEGHANY	952
ANSON	1,356
ASHE	2,554
AVERY	1,231
BEAUFORT	4,246
BERTIE	1,244
BLADEN	1,999
BRUNSWICK	25,802
BUNCOMBE	55,914
BURKE	7,528

CABARRUS	30,536
CALDWELL	6,393
CAMDEN	713
CARTERET	7,304
CASWELL	1,932
CATAWBA	14,758
CHATHAM	16,662
CHEROKEE	2,695
CHOWAN	1,153
CLAY	1,016
CLEVELAND	8,013
COLUMBUS	3,390
CRAVEN	12,716
CUMBERLAND	36,175
CURRITUCK	2,356
DARE	5,084
DAVIDSON	15,763
DAVIE	4,136
DUPLIN	3,204
DURHAM	69,418
EDGECOMBE	3,820
FORSYTH	64,876
FRANKLIN	7,105
GASTON	23,384
GATES	820
GRAHAM	467
GRANVILLE	6,309
GREENE	1,242
GUILFORD	75,163
HALIFAX	3,825
HARNETT	11,902
HAYWOOD	8,144
HENDERSON	20,572
HERTFORD	1,456
HOKE	4,369
HYDE	319
IREDELL	22,089
JACKSON	3,896
JOHNSTON	22,713
JONES	629
LEE	5,830
LENOIR	4,893
LINCOLN	8,194
MACON	4,537
MADISON	2,541
MARTIN	1,854
MCDOWELL	3,658

MECKLENBURG	199,937
MITCHELL	1,291
MONTGOMERY	1,510
MOORE	14,434
NASH	7,943
NEW HANOVER	40,741
NORTHAMPTON	1,415
ONSLOW	13,878
ORANGE	36,262
PAMLICO	1,301
PASQUOTANK	4,023
PENDER	5,929
PERQUIMANS	993
PERSON	3,537
PITT	17,027
POLK	3,322
RANDOLPH	11,287
RICHMOND	2,701
ROBESON	6,251
ROCKINGHAM	6,511
ROWAN	12,809
RUTHERFORD	5,856
SAMPSON	3,919
SCOTLAND	2,512
STANLY	4,671
STOKES	3,599
SURRY	6,946
SWAIN	964
TRANSYLVANIA	5,271
TYRRELL	136
UNION	26,488
VANCE	3,474
WAKE	241,363
WARREN	1,881
WASHINGTON	866
WATAUGA	7,394
WAYNE	9,917
WILKES	5,672
WILSON	6,586
YADKIN	2,836
YANCEY	2,202
Grand Total	**1,420,665**

Table 3. Number of Requests per County, broken down by Voter Party Affiliation (2020)

County, Party	Requests
ALAMANCE	**21,709**
CONSTITUTION	7
DEMOCRATIC	10,387
GREEN	8
LIBERTARIAN	82
REPUBLICAN	4,754
UNAFFILIATED	6,471
ALEXANDER	**2,451**
DEMOCRATIC	981
LIBERTARIAN	5
REPUBLICAN	740
UNAFFILIATED	725
ALLEGHANY	**952**
CONSTITUTION	1
DEMOCRATIC	431
GREEN	3
LIBERTARIAN	3
REPUBLICAN	239
UNAFFILIATED	275
ANSON	**1,356**
DEMOCRATIC	933
GREEN	2
LIBERTARIAN	2
REPUBLICAN	169
UNAFFILIATED	250
ASHE	**2,554**
CONSTITUTION	1
DEMOCRATIC	1,025
LIBERTARIAN	7
REPUBLICAN	796
UNAFFILIATED	725
AVERY	**1,231**
DEMOCRATIC	293
GREEN	2
LIBERTARIAN	7
REPUBLICAN	528
UNAFFILIATED	401
BEAUFORT	**4,246**
CONSTITUTION	3
DEMOCRATIC	2,157
GREEN	4
LIBERTARIAN	17
REPUBLICAN	898
UNAFFILIATED	1,167

BERTIE	**1,244**
DEMOCRATIC	993
GREEN	1
LIBERTARIAN	2
REPUBLICAN	90
UNAFFILIATED	158
BLADEN	**1,999**
DEMOCRATIC	1,220
LIBERTARIAN	7
REPUBLICAN	301
UNAFFILIATED	471
BRUNSWICK	**25,802**
CONSTITUTION	1
DEMOCRATIC	9,881
GREEN	3
LIBERTARIAN	81
REPUBLICAN	6,595
UNAFFILIATED	9,241
BUNCOMBE	**55,914**
CONSTITUTION	15
DEMOCRATIC	29,289
GREEN	59
LIBERTARIAN	232
REPUBLICAN	6,424
UNAFFILIATED	19,895
BURKE	**7,528**
CONSTITUTION	3
DEMOCRATIC	3,310
GREEN	5
LIBERTARIAN	31
REPUBLICAN	1,949
UNAFFILIATED	2,230
CABARRUS	**30,536**
CONSTITUTION	9
DEMOCRATIC	12,134
GREEN	24
LIBERTARIAN	161
REPUBLICAN	7,409
UNAFFILIATED	10,799
CALDWELL	**6,393**
CONSTITUTION	2
DEMOCRATIC	2,322
GREEN	5
LIBERTARIAN	30
REPUBLICAN	2,189
UNAFFILIATED	1,845
CAMDEN	**713**

CONSTITUTION	1
DEMOCRATIC	249
LIBERTARIAN	6
REPUBLICAN	174
UNAFFILIATED	283
CARTERET	**7,304**
CONSTITUTION	3
DEMOCRATIC	2,737
GREEN	5
LIBERTARIAN	27
REPUBLICAN	2,047
UNAFFILIATED	2,485
CASWELL	**1,932**
DEMOCRATIC	1,083
LIBERTARIAN	2
REPUBLICAN	376
UNAFFILIATED	471
CATAWBA	**14,758**
CONSTITUTION	7
DEMOCRATIC	5,259
GREEN	8
LIBERTARIAN	61
REPUBLICAN	4,331
UNAFFILIATED	5,092
CHATHAM	**16,662**
CONSTITUTION	5
DEMOCRATIC	7,704
GREEN	7
LIBERTARIAN	42
REPUBLICAN	2,308
UNAFFILIATED	6,596
CHEROKEE	**2,695**
CONSTITUTION	1
DEMOCRATIC	904
LIBERTARIAN	15
REPUBLICAN	954
UNAFFILIATED	821
CHOWAN	**1,153**
CONSTITUTION	1
DEMOCRATIC	641
LIBERTARIAN	7
REPUBLICAN	204
UNAFFILIATED	300
CLAY	**1,016**
DEMOCRATIC	355
LIBERTARIAN	2
REPUBLICAN	305

UNAFFILIATED	354
CLEVELAND	**8,013**
CONSTITUTION	7
DEMOCRATIC	3,889
GREEN	2
LIBERTARIAN	34
REPUBLICAN	2,070
UNAFFILIATED	2,011
COLUMBUS	**3,390**
DEMOCRATIC	2,175
GREEN	2
LIBERTARIAN	6
REPUBLICAN	503
UNAFFILIATED	704
CRAVEN	**12,716**
CONSTITUTION	4
DEMOCRATIC	5,511
GREEN	7
LIBERTARIAN	61
REPUBLICAN	3,076
UNAFFILIATED	4,057
CUMBERLAND	**36,175**
CONSTITUTION	21
DEMOCRATIC	19,945
GREEN	25
LIBERTARIAN	232
REPUBLICAN	5,886
UNAFFILIATED	10,066
CURRITUCK	**2,356**
CONSTITUTION	1
DEMOCRATIC	722
GREEN	3
LIBERTARIAN	30
REPUBLICAN	659
UNAFFILIATED	941
DARE	**5,084**
CONSTITUTION	1
DEMOCRATIC	2,002
GREEN	3
LIBERTARIAN	25
REPUBLICAN	1,139
UNAFFILIATED	1,914
DAVIDSON	**15,763**
CONSTITUTION	5
DEMOCRATIC	5,355
GREEN	7
LIBERTARIAN	66

REPUBLICAN	5,841
UNAFFILIATED	4,489
DAVIE	**4,136**
CONSTITUTION	2
DEMOCRATIC	1,217
LIBERTARIAN	23
REPUBLICAN	1,533
UNAFFILIATED	1,361
DUPLIN	**3,204**
DEMOCRATIC	1,896
GREEN	4
LIBERTARIAN	11
REPUBLICAN	546
UNAFFILIATED	747
DURHAM	**69,418**
CONSTITUTION	8
DEMOCRATIC	39,809
GREEN	44
LIBERTARIAN	254
REPUBLICAN	5,435
UNAFFILIATED	23,868
EDGECOMBE	**3,820**
CONSTITUTION	1
DEMOCRATIC	2,883
GREEN	1
LIBERTARIAN	5
REPUBLICAN	446
UNAFFILIATED	484
FORSYTH	**64,876**
CONSTITUTION	17
DEMOCRATIC	31,231
GREEN	37
LIBERTARIAN	185
REPUBLICAN	14,048
UNAFFILIATED	19,358
FRANKLIN	**7,105**
CONSTITUTION	2
DEMOCRATIC	3,459
GREEN	4
LIBERTARIAN	47
REPUBLICAN	1,447
UNAFFILIATED	2,146
GASTON	**23,384**
CONSTITUTION	14
DEMOCRATIC	9,610
GREEN	18
LIBERTARIAN	108

REPUBLICAN	6,547
UNAFFILIATED	7,087
GATES	**820**
DEMOCRATIC	506
LIBERTARIAN	1
REPUBLICAN	129
UNAFFILIATED	184
GRAHAM	**467**
DEMOCRATIC	160
LIBERTARIAN	4
REPUBLICAN	183
UNAFFILIATED	120
GRANVILLE	**6,309**
CONSTITUTION	2
DEMOCRATIC	3,287
GREEN	3
LIBERTARIAN	29
REPUBLICAN	1,171
UNAFFILIATED	1,817
GREENE	**1,242**
DEMOCRATIC	855
GREEN	3
LIBERTARIAN	2
REPUBLICAN	149
UNAFFILIATED	233
GUILFORD	**75,163**
CONSTITUTION	20
DEMOCRATIC	38,687
GREEN	36
LIBERTARIAN	288
REPUBLICAN	14,040
UNAFFILIATED	22,092
HALIFAX	**3,825**
CONSTITUTION	1
DEMOCRATIC	2,800
LIBERTARIAN	6
REPUBLICAN	322
UNAFFILIATED	696
HARNETT	**11,902**
CONSTITUTION	4
DEMOCRATIC	5,172
GREEN	10
LIBERTARIAN	74
REPUBLICAN	3,092
UNAFFILIATED	3,550
HAYWOOD	**8,144**
DEMOCRATIC	4,083

GREEN	4
LIBERTARIAN	35
REPUBLICAN	1,583
UNAFFILIATED	2,439
HENDERSON	**20,572**
CONSTITUTION	6
DEMOCRATIC	7,061
GREEN	21
LIBERTARIAN	71
REPUBLICAN	4,879
UNAFFILIATED	8,534
HERTFORD	**1,456**
DEMOCRATIC	1,124
GREEN	2
LIBERTARIAN	3
REPUBLICAN	97
UNAFFILIATED	230
HOKE	**4,369**
CONSTITUTION	6
DEMOCRATIC	2,324
GREEN	5
LIBERTARIAN	38
REPUBLICAN	673
UNAFFILIATED	1,323
HYDE	**319**
DEMOCRATIC	187
GREEN	1
LIBERTARIAN	3
REPUBLICAN	24
UNAFFILIATED	104
IREDELL	**22,089**
CONSTITUTION	7
DEMOCRATIC	7,536
GREEN	12
LIBERTARIAN	114
REPUBLICAN	6,612
UNAFFILIATED	7,808
JACKSON	**3,896**
CONSTITUTION	1
DEMOCRATIC	1,866
GREEN	5
LIBERTARIAN	16
REPUBLICAN	711
UNAFFILIATED	1,297
JOHNSTON	**22,713**
CONSTITUTION	19
DEMOCRATIC	9,689

GREEN	13
LIBERTARIAN	141
REPUBLICAN	5,297
UNAFFILIATED	7,554
JONES	**629**
CONSTITUTION	2
DEMOCRATIC	312
GREEN	1
LIBERTARIAN	4
REPUBLICAN	159
UNAFFILIATED	151
LEE	**5,830**
CONSTITUTION	5
DEMOCRATIC	2,961
GREEN	2
LIBERTARIAN	29
REPUBLICAN	1,144
UNAFFILIATED	1,689
LENOIR	**4,893**
CONSTITUTION	1
DEMOCRATIC	3,275
GREEN	1
LIBERTARIAN	12
REPUBLICAN	732
UNAFFILIATED	872
LINCOLN	**8,194**
CONSTITUTION	8
DEMOCRATIC	2,695
GREEN	4
LIBERTARIAN	43
REPUBLICAN	2,669
UNAFFILIATED	2,775
MACON	**4,537**
CONSTITUTION	3
DEMOCRATIC	1,707
GREEN	6
LIBERTARIAN	19
REPUBLICAN	1,367
UNAFFILIATED	1,435
MADISON	**2,541**
DEMOCRATIC	1,310
GREEN	3
LIBERTARIAN	4
REPUBLICAN	356
UNAFFILIATED	868
MARTIN	**1,854**
CONSTITUTION	1

DEMOCRATIC	1,263
GREEN	1
LIBERTARIAN	3
REPUBLICAN	241
UNAFFILIATED	345
MCDOWELL	**3,658**
DEMOCRATIC	1,589
GREEN	4
LIBERTARIAN	17
REPUBLICAN	945
UNAFFILIATED	1,103
MECKLENBURG	**199,937**
CONSTITUTION	66
DEMOCRATIC	93,017
GREEN	118
LIBERTARIAN	1,013
REPUBLICAN	34,361
UNAFFILIATED	71,362
MITCHELL	**1,291**
DEMOCRATIC	286
GREEN	1
LIBERTARIAN	1
REPUBLICAN	590
UNAFFILIATED	413
MONTGOMERY	**1,510**
CONSTITUTION	1
DEMOCRATIC	674
GREEN	2
LIBERTARIAN	9
REPUBLICAN	403
UNAFFILIATED	421
MOORE	**14,434**
CONSTITUTION	6
DEMOCRATIC	4,920
GREEN	5
LIBERTARIAN	82
REPUBLICAN	4,275
UNAFFILIATED	5,146
NASH	**7,943**
DEMOCRATIC	4,613
GREEN	6
LIBERTARIAN	32
REPUBLICAN	1,528
UNAFFILIATED	1,764
NEW HANOVER	**40,741**
CONSTITUTION	10
DEMOCRATIC	18,003

GREEN	41
LIBERTARIAN	221
REPUBLICAN	8,204
UNAFFILIATED	14,262
NORTHAMPTON	**1,415**
CONSTITUTION	1
DEMOCRATIC	995
LIBERTARIAN	5
REPUBLICAN	116
UNAFFILIATED	298
ONSLOW	**13,878**
CONSTITUTION	13
DEMOCRATIC	5,112
GREEN	22
LIBERTARIAN	150
REPUBLICAN	3,839
UNAFFILIATED	4,742
ORANGE	**36,262**
CONSTITUTION	5
DEMOCRATIC	20,696
GREEN	26
LIBERTARIAN	118
REPUBLICAN	2,348
UNAFFILIATED	13,069
PAMLICO	**1,301**
CONSTITUTION	2
DEMOCRATIC	651
LIBERTARIAN	6
REPUBLICAN	265
UNAFFILIATED	377
PASQUOTANK	**4,023**
CONSTITUTION	1
DEMOCRATIC	2,215
GREEN	4
LIBERTARIAN	14
REPUBLICAN	621
UNAFFILIATED	1,168
PENDER	**5,929**
CONSTITUTION	2
DEMOCRATIC	2,395
GREEN	3
LIBERTARIAN	37
REPUBLICAN	1,520
UNAFFILIATED	1,972
PERQUIMANS	**993**
CONSTITUTION	2
DEMOCRATIC	470

GREEN	1
LIBERTARIAN	2
REPUBLICAN	201
UNAFFILIATED	317
PERSON	**3,537**
DEMOCRATIC	1,923
LIBERTARIAN	13
REPUBLICAN	641
UNAFFILIATED	960
PITT	**17,027**
CONSTITUTION	2
DEMOCRATIC	9,500
GREEN	12
LIBERTARIAN	92
REPUBLICAN	2,661
UNAFFILIATED	4,760
POLK	**3,322**
CONSTITUTION	1
DEMOCRATIC	1,288
GREEN	3
LIBERTARIAN	11
REPUBLICAN	690
UNAFFILIATED	1,329
RANDOLPH	**11,287**
CONSTITUTION	3
DEMOCRATIC	3,823
GREEN	5
LIBERTARIAN	57
REPUBLICAN	4,239
UNAFFILIATED	3,160
RICHMOND	**2,701**
DEMOCRATIC	1,590
GREEN	1
LIBERTARIAN	7
REPUBLICAN	434
UNAFFILIATED	669
ROBESON	**6,251**
CONSTITUTION	1
DEMOCRATIC	3,970
GREEN	4
LIBERTARIAN	18
REPUBLICAN	799
UNAFFILIATED	1,459
ROCKINGHAM	**6,511**
CONSTITUTION	5
DEMOCRATIC	3,183
GREEN	3

LIBERTARIAN	23
REPUBLICAN	1,665
UNAFFILIATED	1,632
ROWAN	**12,809**
CONSTITUTION	5
DEMOCRATIC	4,922
GREEN	12
LIBERTARIAN	59
REPUBLICAN	3,884
UNAFFILIATED	3,927
RUTHERFORD	**5,856**
DEMOCRATIC	2,376
GREEN	4
LIBERTARIAN	24
REPUBLICAN	1,708
UNAFFILIATED	1,744
SAMPSON	**3,919**
CONSTITUTION	2
DEMOCRATIC	2,258
GREEN	1
LIBERTARIAN	13
REPUBLICAN	922
UNAFFILIATED	723
SCOTLAND	**2,512**
DEMOCRATIC	1,494
LIBERTARIAN	3
REPUBLICAN	366
UNAFFILIATED	649
STANLY	**4,671**
CONSTITUTION	3
DEMOCRATIC	1,772
GREEN	4
LIBERTARIAN	14
REPUBLICAN	1,594
UNAFFILIATED	1,284
STOKES	**3,599**
CONSTITUTION	2
DEMOCRATIC	1,225
GREEN	2
LIBERTARIAN	11
REPUBLICAN	1,423
UNAFFILIATED	936
SURRY	**6,946**
CONSTITUTION	1
DEMOCRATIC	3,047
GREEN	5
LIBERTARIAN	23

REPUBLICAN	2,187
UNAFFILIATED	1,683
SWAIN	**964**
CONSTITUTION	1
DEMOCRATIC	439
GREEN	3
LIBERTARIAN	6
REPUBLICAN	205
UNAFFILIATED	310
TRANSYLVANIA	**5,271**
CONSTITUTION	2
DEMOCRATIC	2,070
LIBERTARIAN	8
REPUBLICAN	965
UNAFFILIATED	2,226
TYRRELL	**136**
DEMOCRATIC	89
REPUBLICAN	12
UNAFFILIATED	35
UNION	**26,488**
CONSTITUTION	8
DEMOCRATIC	9,410
GREEN	18
LIBERTARIAN	143
REPUBLICAN	7,149
UNAFFILIATED	9,760
VANCE	**3,474**
CONSTITUTION	2
DEMOCRATIC	2,421
LIBERTARIAN	19
REPUBLICAN	442
UNAFFILIATED	590
WAKE	**241,363**
CONSTITUTION	76
DEMOCRATIC	103,240
GREEN	142
LIBERTARIAN	1,298
REPUBLICAN	39,764
UNAFFILIATED	96,843
WARREN	**1,881**
DEMOCRATIC	1,297
LIBERTARIAN	5
REPUBLICAN	255
UNAFFILIATED	324
WASHINGTON	**866**
DEMOCRATIC	634
LIBERTARIAN	3

REPUBLICAN	90
UNAFFILIATED	139
WATAUGA	**7,394**
DEMOCRATIC	2,972
GREEN	9
LIBERTARIAN	27
REPUBLICAN	1,332
UNAFFILIATED	3,054
WAYNE	**9,917**
CONSTITUTION	6
DEMOCRATIC	5,428
GREEN	8
LIBERTARIAN	67
REPUBLICAN	2,164
UNAFFILIATED	2,244
WILKES	**5,672**
CONSTITUTION	8
DEMOCRATIC	2,078
GREEN	2
LIBERTARIAN	24
REPUBLICAN	2,218
UNAFFILIATED	1,342
WILSON	**6,586**
CONSTITUTION	2
DEMOCRATIC	3,778
GREEN	3
LIBERTARIAN	21
REPUBLICAN	1,240
UNAFFILIATED	1,542
YADKIN	**2,836**
CONSTITUTION	5
DEMOCRATIC	843
GREEN	2
LIBERTARIAN	9
REPUBLICAN	1,167
UNAFFILIATED	810
YANCEY	**2,202**
DEMOCRATIC	1,101
GREEN	1
LIBERTARIAN	4
REPUBLICAN	477
UNAFFILIATED	619
Grand Total	**1,420,665**

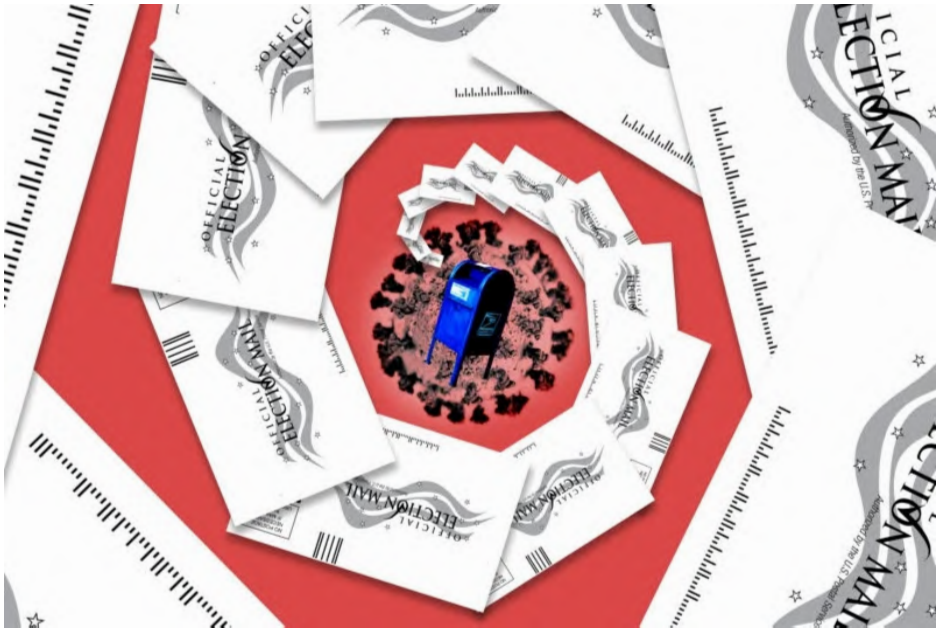
Data Sources: absentee_demo_stats_20201103.csv, absentee_20161108.zip

NATIONAL

Poorly Protected Postal Workers Are Catching COVID-19 by the Thousands. It's One More Threat to Voting by Mail.

More than 50,000 workers have taken time off for virus-related reasons, slowing mail delivery. The Postal Service doesn't test employees or check their temperatures, and its contact tracing is erratic.

by Maryam Jameel and Ryan McCarthy, Sept. 18, 5 a.m. EDT



Shoshana Gordon/ProPublica; source images: Centers for Disease Control and Prevention, U.S. Postal Service and Wikimedia Commons

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For months, one postal worker had been doing all she could to protect herself from COVID-19. She wore a mask long before it was required at her plant in St. Paul, Minnesota. She avoided the lunch room, where she saw little social distancing, and ate in her car.

The stakes felt especially high. Her husband, a postal worker in the same facility, was at high risk because his immune system is compromised by a condition unrelated to the coronavirus. And the 20-year veteran of the U.S. Postal Service knew that her job, operating a machine that sorts mail by

ZIP code, would be vital to processing the flood of mail-in ballots expected this fall.

By mid-August, more than 20 workers in her building had tested positive for the coronavirus. Then, in a list of talking points on her supervisor's desk, she spotted a reference to a new positive case at the plant. She had heard that someone she'd worked with closely a few days earlier was out sick, but no one at USPS had told her to quarantine, and no contact tracer had reached out to her. Although USPS' protocol is to tell workers when they've been exposed to COVID-19, that didn't happen, she and another postal worker familiar with the case said.

Asking around, she learned that a colleague she'd partnered with to load mail into the sorting machine had been infected. She phoned her doctor, who advised her to quarantine and get tested. Later that week, she tested positive and began suffering body aches, a sore throat and fatigue.

"They should've told anybody who worked with him, 'You need to go home.' What is it going to take, somebody to die in the building before they take it seriously?" said the worker, who requested anonymity for fear of retaliation.

In recent weeks, furors over Postmaster General Louis DeJoy's cost-cutting initiatives, and over President Donald Trump's unsubstantiated warnings of voter fraud, have overshadowed a significant threat to the Postal Service's ability to handle the expected tens of millions of mail-in ballots this fall: a rapid rise in the number of workers sidelined by COVID-19.

The total number of postal workers testing positive has more than tripled from about 3,100 cases in June to 9,600 in September, and at least 83 postal workers have died from complications of COVID-19, according to USPS. Moreover, internal USPS data shows that about 52,700 of the agency's 630,000 employees, or more than 8%, have taken time off at some point during the pandemic because they were sick, or had to quarantine or care for family members.

High rates of absence could slow ballot delivery in key states, especially if there's a second wave of the coronavirus, as some epidemiologists predict. Twenty-eight states, including Pennsylvania, Wisconsin and Florida, require mail-in ballots to arrive by Election Day to be counted.

Even in a normal year, absentee levels of this magnitude "would have a dramatic effect on the mission of the postal service," said Alan Kessler, an attorney who served on the Postal Service's Board of Governors during the Clinton and George W. Bush administrations, including as chairman from 2008 to 2011. "When people ask me about November, my biggest concern right now is exactly that — the on-time delivery of mail." Kessler is a former finance vice chair of the Democratic National Committee.

What vacant positions have been filled at USPS have been filled by less experienced temporary workers. Restrictions on overtime pay under DeJoy may have prevented full-time workers at some facilities from adding hours to pick up some of the slack. While USPS has nearly $14 billion in cash, it reserves some of that funding to pre-pay employee pensions, and it is projected to run out of money next spring. On Thursday, a federal judge in Washington state temporarily halted operational changes that have slowed mail delivery, finding that "at the heart of DeJoy's and the Postal Service's actions is voter disenfranchisement."

As the St. Paul worker's case illustrates, the Postal Service's half-hearted precautions against COVID-19 have contributed to the problem. Its efforts to limit the virus's spread in the workplace fall short of recommendations by the Centers for Disease Control and Prevention. Unlike Amazon, which relies on USPS to help deliver its packages, the Postal Service doesn't test workers or check their temperatures, depending instead on self-reporting. When employees get sick, USPS sometimes neglects to tell co-workers, and its efforts at contact tracing have been inconsistent and understaffed.

Reflecting these shortcomings, the U.S. Occupational Safety and Health Administration has received more than 250 coronavirus-related complaints against the Postal Service since March, more than twice the number filed against private employers in the same industry like Amazon, FedEx and the UPS. Amazon, which has almost 250,000 more workers than the postal service, had 117 complaints. The complaints against USPS paint a worrisome picture. They typically allege failures to maintain social distancing, enforce mask wearing or inform workers when colleagues have the virus.

The tally doesn't include open complaints yet to be made public, including one by another worker in the same St. Paul building. That July complaint, obtained by ProPublica, accused USPS of "not communicating and informing employees that may have potentially been exposed to positive COVID-19 employees," as well as inadequate ventilation and six other hazards. The Postal Service responded to OSHA that it traces contacts of all employees who test positive and encourages ailing employees to stay home. Nevertheless, OSHA told the complainant that it will inspect the facility as soon as possible.

The Postal Service has been adamant that it can handle a nationwide increase in voting by mail in the general election. Even a mass shift to mail-in ballots would represent a small portion of its overall volume.

Still, DeJoy, a major donor to President Donald Trump and the Republican Party, acknowledged in congressional testimony last month that COVID-19-related absences had upended mail service. "Across the country, our employee availability is down 3 to 4% on average," DeJoy said. "But the issue is in some of the hot spots in the country, areas like Philadelphia and

Detroit — there's probably 20 [other areas] the averages cover — they could be down 20%. And that is contributing to the delivery problem that we're having."

The Postal Service referred us to an April 30 statement on its website. Its COVID-19 leadership team "is focusing on employee and customer safety in conjunction with operational and business continuity during this unprecedented epidemic," according to the statement. "We continue to follow the strategies and measures recommended by the Centers for Disease Control and Prevention and public health departments."

Among its initiatives, the statement said, the Postal Service is supplying its more than 30,000 locations with masks, gloves and cleaning supplies. Employees who can't maintain social distance must wear masks. The service has reduced employee contact with the public by eliminating a rule that customers must sign mobile devices for deliveries, and it has updated its leave policy to allow workers to take extra time off for illness and child care.

Postal workers who test positive are supposed to tell their supervisor, who should alert a nurse responsible for contact tracing. But communication is sometimes lacking. "They have the occupational nurse doing the contact tracing, but sometimes there's no contact with the worker. And some managers don't report [the case] to the tracking. Some managers tell people, 'You don't sound sick, come to work,'" said Omar Gonzalez, western regional coordinator at the American Postal Worker Union. "So we don't really know what to rely on."

One reason that the system breaks down is a shortage of contact tracers. USPS, which does not provide medical care to workers, employs about 160 nurses. Alongside other administrative duties, they are supposed to register COVID-19 cases and interview workers when they get sick. In the New York district, one nurse has been responsible for contact tracing for about 8,200 employees; in Detroit, the ratio is two nurses per 11,600 workers; and in Atlanta, one for 12,500. Facilities in all three districts have seen coronavirus outbreaks. USPS has reemployed 10 former agency nurses to assist with contact tracing, according to a spokesperson.

"To use the word contact tracing is a joke," said Jonathan Smith, president of the New York metro area's postal worker union.

Coronavirus outbreaks in several areas have correlated with slower delivery times. First-class delivery has slowed since March, with notable lags in New York, New Jersey, Philadelphia, Detroit, Chicago, Houston and Southern California, according to data from GrayHair Software, which tracks postal analytics.

COVID-19 has "caused severe disruptions to on-time delivery in many parts of the country," the U.S. Senate Committee on Homeland Security

and Governmental Affairs reported this week. In late March and early April, it found a spike in cases in Michigan, "especially in the Detroit area," led to a "notable drop in on-time delivery."

In Philadelphia, where more than 235 postal workers have tested positive, local media outlets reported unsorted mail piling up in postal facilities and carriers unable to complete routes even after working extra hours. Some residents said they went two to three weeks without receiving mail. In April, COVID-19-related delays in Detroit facilities slowed delivery of primary ballots for parts of northwest Ohio, prompting Ohio's secretary of state to call for in-state processing of all ballots. In Michigan's August primary election, more than 6,400 residents' votes weren't counted because they arrived after the deadline, though it's not clear whether COVID-19 was a major factor.

Internal USPS data from its southern region in mid-August shows the impact of the coronavirus on workers. In Atlanta, more than 900 postal workers had been infected with COVID-19 or had to quarantine. More than 550 workers were affected in Houston and an additional 485 in South Florida.

COVID-19 outbreaks have strained postal offices that had inadequate staffing even before the pandemic, said Michael Caref, national business agent of the Illinois chapter of the National Association of Letter Carriers. "Now you're seeing crisis levels in some areas."

In March, the Postal Service donated 500,000 N95 masks "in excess of our needs" for distribution to hospitals and other critical workers, according to a draft letter from the Board of Governors to members of Congress that was made public by American Oversight. However, the service doesn't provide N95 masks, which are considered especially effective at filtering out virus particles, to most of its own employees. A Postal Service spokesperson said USPS supplies N95 masks to employees who require them. Other workers receive surgical masks.

The CDC and OSHA have both released guidance on how employers should protect workers, though it does not carry the power of law. According to the CDC, "businesses and employers can prevent and slow the spread of COVID-19 within the workplace."

The CDC advises employers to "consider conducting daily in-person or virtual health checks (e.g., symptom and/or temperature screening) of employees before they enter the facility." The Postal Service doesn't conduct those checks. The onus falls on workers to stay home if they notice symptoms, get tested, report back on results and recall whom they were in contact with.

At Amazon, which has also been criticized for failing to protect its employees during the pandemic, precautions are more stringent.

According to an Amazon spokesperson, the company does daily temperature checks and has installed thermal cameras at some of its sites. When an employee is exposed, the company "immediately kicks-off contact tracing to determine if anyone was exposed to that individual, and we inform those employees right away and ask them to quarantine for 14 days with pay," the spokesperson said.

FedEx's protections also appear more robust than the Postal Service's. FedEx checks temperatures of employees at some of its sites, and it has expanded testing to 43 locations since July, according to a company spokesperson.

The CDC advises employers to collaborate with local and state health departments on contact tracing. According to its guidance, employees who are asymptomatic but have been within about 6 feet of a person with COVID-19 for a prolonged period of time should self-isolate and quarantine for 14 days. Often, contact tracing is needed to identify those employees.

But even when USPS employees report positive tests, supervisors don't always follow through. In August, an asymptomatic employee in Flint, Michigan, tested positive for COVID-19 and told a supervisor as well as a few co-workers. The worker stopped coming in, but the supervisor didn't inform USPS' medical unit until four days later — after the exposed workers had told their union, which in turn reported the case to management. Michael Mize, the local postal union president, said he pushed the supervisor to report it. A USPS nurse started contact tracing on the fifth day.

"That's way too slow," said George Rutherford, a professor of epidemiology and biostatistics at the University of California at San Francisco School of Medicine.

Because most people infected with COVID-19 often begin shedding large amounts of virus four or five days after they're exposed, even if they're asymptomatic, co-workers in Flint might have transmitted the disease before the nurse contacted them, Rutherford said. "That's why you gotta get on this stuff quickly." According to CDC guidance, exposed co-workers should be contacted and tested within 24 hours.

USPS and union officials had a Zoom call to discuss what went wrong in Flint, Mize said. "Luckily we don't have any major outbreaks because of any failures that happened," he said. "If things aren't handled appropriately, you're relying on good fortune."

Roscoe Woods, a Detroit-area postal union president, said that USPS sometimes lacks up-to-date contact information, complicating the task of contact tracers. In addition, employees often don't know the surnames of exposed co-workers. "You're trying to trace down eight people and all their

contact information is bad," said Woods, who has stepped in to help with contact tracing in the past.

When employees are sidelined because of the coronavirus, USPS can fill in some of the gaps by hiring employees who aren't in the union. But the Postal Service has long had trouble hiring and retaining temporary or non-career employees, and union representatives say the Postal Service has been slow to fill these roles during the pandemic.

In February, the Postal Service's Office of Inspector General faulted the agency for failing to recruit and retain nonunion workers. In 2019, the annual turnover rate for non-career employees, who constitute 21% of the workforce, was 38.5%; the average tenure for workers who left their jobs was just 81 days. One of the top reasons for leaving: Workers said that supervisors didn't treat them with respect. The jobs filled by these workers are physically strenuous, pay about $17 an hour, lack benefits and often require an inconsistent work schedule. It can take weeks to hire and train them.

"The hiring process is really slow," Caref said. "And if you have a person that says they want to work, the person is not prepared for a month after they've been hired. They really need to figure that out."

Virus-related OSHA complaints from around the country reflect some of the dangers and frustrations postal workers have faced throughout the pandemic.

"The station and the vehicles have not been cleaned and sanitized. Bleach spray bottles were provided at one time but the employees were not provided material to wipe down surfaces and the bottles have since broken," reads a complaint filed from Houston on June 18. "Employees in the vehicles do not have hand sanitizer or another method to cleanse hands while away from the station."

In a postal facility in Smithtown, New York, "the air conditioning has not been working properly for the last 3-4 weeks (blowing 81 degrees at the vent) which has made working in the building uncomfortable and may be contributing to employees not wanting to [wear] their masks," a complaint stated in mid-July. It's unclear what action, if any, OSHA took on the Houston and Smithtown complaints, which are now closed.

Since the worker in St. Paul began quarantining in mid-August, there have been at least 11 COVID-19 cases at her workplace, according to Postal Service emails obtained by ProPublica. Overall, at least 33 out of more than 1,000 workers have tested positive at the building since the start of the pandemic.

In USPS' Northland District, which covers Minnesota — including the St. Paul plant — and western Wisconsin, at least 148 workers have tested

positive. "We had a record breaking day with COVID-19 positive cases today. 18 employees must be quarantined. This is not a good record," reads an Aug. 25 email from USPS management to unions regarding the Northland District.

"We had 4 new COVID-19 cases reported today. Things aren't getting any better," management said in an email two days later.

No one replaced the St. Paul postal worker while she was out. She returned to the job this month, even though she was still recovering and low on energy, because she needed the money. After two weeks of sick leave, her days off were unpaid, and her husband hasn't worked for four months because of an unrelated health condition. Plus, the situation at the plant has improved somewhat: Social distancing has become mandatory in the break rooms, and employees were warned that not wearing masks could jeopardize their jobs.

She also felt a civic obligation, because she'll be responsible for processing thousands of ballots in the upcoming election.

"That's another reason why I want to go back to work," she said. "I want to make sure the ballots get run."

Jack Gillum and Rachel Glickhouse contributed reporting.

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EMERGENCY ORDER – Updated 11/5/2018
G.S. § 163A-750; 08 NCAC 01.0106

1. Hurricane Florence ("Florence") made landfall on or about September 14, 2018, severely damaging persons and property across eastern North Carolina. The President of the United States declared a Major Disaster and the Governor of North Carolina declared a State of Emergency and called a special session of the General Assembly that convened October 2, 2018.

2. Session Law 2018-134 enacted a process by which county boards of elections could relocate voting sites affected by Florence, allocated funding for a public information campaign to highlight registration and voting options, and extended the voter registration deadline in the following thirty-four (34) counties (the "Affected Counties"):

Beaufort	Johnston	Sampson
Bladen	Jones	Scotland
Brunswick	Lee	Wayne
Carteret	Lenoir	Wilson
Columbus	Moore	
Craven	New Hanover	*Anson*
Cumberland	Onslow	*Chatham*
Duplin	Pamlico	*Durham*
Greene	Pender	*Guilford*
Harnett	Pitt	*Orange*
Hoke	Richmond	*Union*
Hyde	Robeson	

3. The State Board of Elections & Ethics Enforcement ("State Board") staff continue to monitor the effect of Florence across the State and remain in communication with disaster response teams, the U.S. Postal Service, and county elections administrators.

4. The State Board convened in open session on October 17, 2018. During that meeting, members of the State Board and the Executive Director discussed the effects of Florence on voting populations and the November 6, 2018 general election.

5. Statute provides that the Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in districts where the normal schedule has been disrupted by a natural disaster. G.S. § 163A-750(a)(1). The

exercise of such powers must avoid unnecessary conflict with existing law. G.S. § 163A-750(a).

6. Administrative rules authorized by the State Board, adopted by the Executive Director, and approved by the Rules Review Commission provide standards for the exercise of emergency powers. *See* 08 NCAC 01.0106. Pursuant thereto, the Executive Director finds the following:
    a. 08 NCAC 01.0106(a): Florence and its aftermath have disrupted the normal schedule for the election and impaired critical components of election administration by displacing persons, damaging property, and affecting mail delivery, which have cumulatively impaired voting opportunities in Affected Counties and absentee voting processes more broadly.
    b. 08 NCAC 01.0106(b)(1)(A): Hurricane Florence is a qualifying natural disaster permitting the Executive Director to assess the propriety of emergency action.
    c. 08 NCAC 01.0106(c): The Executive Director has shaped the exercise of emergency power having considered the following:
        - 08 NCAC 01.0106(c)(1): The geographic scope of disruption is limited to the Affected Counties identified by the President of the United States as within a Major Disaster area and targeted specifically by Session Law 2018-134. Remedial action as to absentee ballot delivery, however, cannot be limited to the recipient Affected County, because mail transit routes and/or delays may affect the delivery of ballots sent from any location to either an Affected County or a non-affected county.
        - 08 NCAC 01.0106(c)(2): Select contests span both affected and non-affected areas and include statewide ballot items. The considered exercise of power works to preserve the rights of candidates and voters participating in contests that span affected and non-affected areas.
        - 08 NCAC 01.0106(c)(3): More than one month has passed since Florence made landfall, and the disruption in advance of Election Day is highly foreseeable. The State Board has also invested heavily in advertising campaigns communicating the registration and voting options available this election. Nevertheless, the types of disruptions addressed by the exercise of emergency power contained in this Order are not adequately remedied by increased public awareness.
        - 08 NCAC 01.0106(c)(4): Alternative registration options were made available in Affected Counties by special enactments that extended the voter registration deadline. S.L. 2018-134, § 5.3.(a). The General Assembly additionally directed procedures by which county boards may relocate early voting sites and Election Day precinct locations. Early voting has not been suspended based

upon the disruption, and same-day registration remains available to individuals who appear during the early voting period. Registrants may present proof of residency using an electronic document. Voters displaced outside of their county of registration are able to request an absentee ballot sent to the address of their choosing. Accordingly, registration and voting opportunities remain available.

- 08 NCAC 01.0106(c)(5) and 01.0106(c)(6): The duration of disruption is ongoing and residents and voters remain displaced. Media reports indicate thousands remain displaced due to Florence. *See* Jason DeBruyn, "FEMA Brings Trailers to NC For Temporary Housing", *WUNC* (October 18, 2018). Additionally, FEMA has announced temporary housing services. FEMA, "Direct Temporary Housing for North Carolina Disaster Survivors", Release DR-4393-NC, (October 15, 2018). Displaced persons staying with family or friends may not be included in the count of those utilizing federal housing assistance. Some election workers cannot be reached or are no longer available to serve due to disruption, and in some precincts an insufficient number of elections officials are available to fill the positions of judge and chief judge.
- 08 NCAC 01.0106(c)(7): The General Assembly has approved processes that ensure secure voting locations. While access to some voting locations was a point of initial concern, the State Board staff remain in ongoing contact with county administrators who are best positioned to recommend any relocations to their respective county boards.
- 08 NCAC 01.0106(c)(8): The Executive Director transmitted correspondence to the Governor, President Pro Tempore of the Senate, and Speaker of the House on September 26, 2018, detailing current legal deadlines and administrative processes affecting voter registration, voting by mail, election workers, voting sites, and displaced voters. The letter also cited the administrative rule requiring consideration of the time remaining for the political branches to address disruptions. In the month since Florence made landfall, the General Assembly and the Governor have approved emergency legislation on three occasions: Session Laws 2018-134 (ratified October 2), 2018-135 (ratified October 2), and 2018-136 (ratified October 15).
- 08 NCAC 01.0106(c)(9): Emergency remedial measures contained in this Order do not erode election integrity and ballot security. All changes to absentee balloting involve administrative handling of absentee ballots while suspending no security requirements contained in current law.

- 08 NCAC 01.0106(c)(10): Emergency remedial measures are calculated to have minimal effect on certification deadlines in that no deadline extends beyond the deadline by which certain ballots from overseas and military voters must be accepted under current law.

7. In evaluating the disruption and establishing remedial effects, every effort has been made to treat similarly situated persons equally, while appropriately tailoring relief to offset the nature and scope of the disruption as required by law.

Based upon the foregoing findings and conclusions, and in exercise of G.S. § 163A-750 and 08 NCAC 01.0106, the Executive Director hereby **ORDERS**:

A. Civilian absentee ballots delivered by mail or commercial courier service to the appropriate county board of elections office in any of the twenty-eight Affected Counties shall be counted if received no later than 5 p.m. Thursday, November 15, 2018, if the container return envelope was postmarked on or before Election Day, November 6. This directive modifies the deadlines contained in G.S. § 163A-1310(b)(2) only, and in no other respect.

B. Any voter or other person authorized by law may deliver an absentee ballot in person to any early voting site or county board of elections office in the state; the absentee ballot must be delivered during the site or office's hours of operation and shall be considered timely if delivered by 5 p.m. on Election Day, November 6. County boards of elections must ensure delivery to the appropriate county board of elections office prior to canvass on November 16, 2018. This directive modifies restrictions as to the location of delivery in G.S. § 163A-1310 only, and in no other respect.

C. In any precinct in an Affected County where, due to the effects of Florence, the county board finds that an insufficient number of precinct officials are available to fill the majority of the three positions of chief judge and judge with residents of that precinct, the county board may appoint nonresidents of the precinct to a majority of the positions provided that the officials otherwise meet all requirements.

This the fifth day of November, 2018.

Kim Westbrook Strach
Executive Director
State Board of Elections & Ethics Enforcement

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EMERGENCY EXECUTIVE ORDER
Friday, September 6, 2019
G.S. § 163A-750; 08 NCAC 01.0106

1. Hurricane Dorian ("Dorian") made landfall on or about September 5, 2019, damaging property and causing power outages across eastern North Carolina. The Governor of North Carolina declared a State of Emergency in anticipation of Dorian on August 31, 2019.
2. Due to the disruption caused by Hurricane Dorian, the following counties in the Congressional District 9 special election ("Affected Counties") were closed for certain portions of the one-stop early voting period:

   Bladen

   Cumberland

   Robeson

   Scotland
3. The State Board of Elections ("State Board") staff continue to monitor the effects of Dorian across the State and remain in communication with state and federal partners, emergency response personnel, the U.S. Postal Service, and county elections administrators. Additional executive orders may be issued if needed.
4. The State Board convened in open session on September 5, 2019. During that meeting, members of the State Board and the Executive Director discussed the effects of Dorian on voting populations and the September 10 special congressional election.
5. Statute provides that the Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in districts where the normal schedule has been disrupted by a natural disaster. G.S. § 163A-750(a)(1). The exercise of such powers must avoid unnecessary conflict with existing law. G.S. § 163A-750(a).
6. Administrative rules provide standards for the exercise of emergency powers. See 08 NCAC 01. 0106. Pursuant thereto, the Executive Director finds the following:
   a. 08 NCAC 01. 0106(a): Dorian and its aftermath has disrupted the normal schedule for the election and impaired critical components of election administration by displacing persons, damaging property, and disrupting the one-stop early voting period. Each Affected County closed its one-stop sites for portions or all of the day

on Wednesday, Thursday, and/or Friday of the last week of the early voting period. Cumberland and Scotland counties reopened their sites for voting on Friday.

b. 08 NCAC 01. 0106(b)(1)(A): Hurricane Dorian is a qualifying natural disaster permitting the Executive Director to assess the propriety of emergency action.

c. 08 NCAC 01. 0106(c): The Executive Director has defined the scope of the exercise of emergency power having considered the following:

- 08 NCAC 01. 0106(c)(1): The geographic scope of disruption is limited to the Affected Counties identified above. The other counties in Congressional District 9 did not experience a disruption at early voting locations or otherwise.

- 08 NCAC 01. 0106(c)(2): The contest at issue, Congressional District 9, spans affected and non-affected areas. The considered exercise of power works to preserve the rights of candidates and voters participating in this contest. Extending one-stop hours in only Affected Counties works to ensure that voters across the district are given a fair opportunity to participate in the election.

- 08 NCAC 01. 0106(c)(3): Only one day has passed since Dorian made landfall, and inclement weather continues in the State. While the disruption in advance of the election was foreseeable, the specific impacts of Dorian were not. The State Board has created a page on its website to inform the public about closures of early voting sites. Nevertheless, the types of disruptions addressed by the exercise of emergency power contained in this Order cannot be adequately addressed by public awareness because the closure of the final day(s) of one-stop voting in Affected Counties prevented some voters from having an opportunity to cast their ballots.

- 08 NCAC 01. 0106(c)(4): Alternative registration options were not available in Affected Counties. While voters may have the opportunity vote on Election Day at their precinct locations, they are not be able to same-day register on Election Day. The deadline to register to vote had already passed when Dorian made landfall, as had the deadline to request an absentee ballot.

- 08 NCAC 01. 0106(c)(5) and 01. 0106(c)(6): The duration of the disruption of one-stop voting was Wednesday, Thursday, and/or Friday of the last week of early voting in Affected Counties. It is not anticipated that large numbers of voters in Congressional District 9 were displaced by Dorian. The remedy in this Order, extending certain early voting hours, is tailored

to make up for the closures that occurred earlier in the week. However, it is not possible in every county to make up for the early-voting closures on an hour-by-hour basis. The Executive Director has communicated with each county board of elections in Affected Counties to understand their ability to administer extended early voting hours. Some election workers cannot be reached or are no longer available to serve due to the disruption or because they were never scheduled to work over the weekend. County boards of elections are also preparing over the weekend and on Monday for Election Day on Tuesday. This includes uploading voter history from one-stop pollbooks, syncing and printing pollbooks for Election Day, and preparing other supplies for distribution to voting sites.

- 08 NCAC 01. 0106(c)(7): State Board staff remain in ongoing contact with county elections officials, who are best positioned to advise on the feasibility of any modifications. One-stop sites identified in this Order are available for voting.

- 08 NCAC 01. 0106(c)(8): There is not time for the General Assembly to respond since Election Day is on Tuesday, and one-stop voting must be extended today in order to occur tomorrow. The Executive Director transmitted a copy of Numbered Memo 2019-05 to the Governor, President Pro Tempore of the Senate, and Speaker of the House, and the political parties, on September 3, 2019, detailing preparations made by the agency prior to landfall of Dorian. The letter also cited the administrative rule permitting the executive director to exercise emergency powers in certain circumstances. The political parties have submitted correspondence to the Executive Director requesting certain extensions of one-stop voting.

- 08 NCAC 01. 0106(c)(9): Emergency remedial measures contained in this Order do not erode election integrity and ballot security. State Board staff have consulted with Affected Counties to ensure they will be able to securely carry out the directives in this Order.

- 08 NCAC 01. 0106(c)(10): Emergency remedial measures will not affect certification deadlines.

7. In evaluating the disruption and establishing remedial effects, every effort has been made to treat similarly situated persons equally, while appropriately tailoring relief to offset the nature and scope of the disruption as required by law.

Based upon the foregoing findings and conclusions, and in exercise of G.S. § 163A-750 and 08 NCAC 01. 0106, the Executive Director hereby ORDERS:

Early voting, including same-day registration is ordered to take place in Affected Counties as follows:

Bladen

Friday, September 6, 2019

County Board of Elections office from 12 p.m. to 7 p.m.

Tar Heel Municipal Building from 12 p.m. to 7 p.m.

Saturday, September 7, 2019

County Board of Elections office from 8:30 a.m. to 7 p.m.

Tar Heel Municipal Building from 8:30 a.m. to 7 p.m.

Cumberland

Saturday, September 7, 2019

County Board of Elections office and East Regional Library from 8 a.m. to 2 p.m.

Robeson

Friday, September 6, 2019:

County Board of Elections office from 12 p.m. to 5:15 p.m.

All other one-stop sites from 1 p.m. to 7 p.m.

Saturday, September 7, 2019:

County Board of Elections office from 7 a.m. to 7 p.m.

All other one-stop sites from 8 a.m. to 5:30 p.m.

Scotland

Saturday, September 7, 2019:

County Board of Elections office from 7 a.m. to 7 p.m.

This directive modifies the schedule of one-stop early voting contained in G.S. § 163A 1300(b) and S.L. 2019-22 only, and in no other respect.

This the 5th day of September, 2019.

Karen Brinson Bell

Karen Brinson Bell
Executive Director
State Board of Elections

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SECOND EMERGENCY EXECUTIVE ORDER
Friday, September 6, 2019
G.S. § 163A-750; 08 NCAC 01.0106

1. Hurricane Dorian ("Dorian") made landfall on or about September 5, 2019, damaging property and causing power outages across eastern North Carolina. The Governor of North Carolina declared a State of Emergency in anticipation of Dorian on August 31, 2019.

2. Due to the disruption caused by Hurricane Dorian, all county boards of elections in the Congressional District 3 special election were closed for certain portions of the one-stop early voting period. These counties ("Affected Counties") are:

Beaufort	Dare	Pamlico
Camden	Greene	Pasquotank
Carteret	Hyde	Perquimans
Chowan	Jones	Pitt
Craven	Lenoir	Tyrrell
Currituck	Onslow	

3. The State Board of Elections ("State Board") staff continue to monitor the effects of Dorian across the State and remain in communication with state and federal partners, emergency response personnel, the U.S. Postal Service, and county elections administrators. Additional executive orders may be issued if needed.

4. The State Board convened in open session on September 5, 2019. During that meeting, members of the State Board and the Executive Director discussed the effects of Dorian on voting populations and the September 10 special congressional election.

5. Statute provides that the Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in districts where the normal schedule has been disrupted by a natural disaster. G.S. § 163A-750(a)(1). The exercise of such powers must avoid unnecessary conflict with existing law. G.S. § 163A-750(a).

6. Administrative rules provide standards for the exercise of emergency powers. See 08 NCAC 01. 0106. Pursuant thereto, the Executive Director finds the following:

    a. 08 NCAC 01. 0106(a): Dorian and its aftermath has disrupted the normal schedule for the election and impaired critical components of election administration by

displacing persons, damaging property, and disrupting the one-stop early voting period across the district. Each Affected County closed its one-stop sites for portions or all of the day on Wednesday, Thursday, and/or Friday of the last week of the early voting period.

b. 08 NCAC 01. 0106(b)(1)(A): Hurricane Dorian is a qualifying natural disaster permitting the Executive Director to assess the propriety of emergency action.

c. 08 NCAC 01. 0106(c): The Executive Director has defined the scope of the exercise of emergency power having considered the following:

- 08 NCAC 01. 0106(c)(1): The geographic scope of disruption covers the entire Congressional District 3. However, some Affected Counties are experiencing a more substantial disruption than other Affected Counties. In some counties, mandatory curfews and mandatory evacuations continue. There are widespread power outages. Some areas are unreachable by road. Other areas experienced disruptions but conditions have largely returned to normal at the time of the issuance of this Order.

- 08 NCAC 01. 0106(c)(2): The contest at issue, Congressional District 3, spans the entire affected area.

- 08 NCAC 01. 0106(c)(3): Only one day has passed since Dorian made landfall. While the disruption in advance of the election was foreseeable, the specific impacts of Dorian were not. The State Board has created a page on its website to inform the public about closures of early voting sites. Nevertheless, the types of disruptions addressed in this Order, including disruptions in one-stop voting and mail delivery, cannot be adequately addressed by public awareness.

- 08 NCAC 01. 0106(c)(4): Alternative registration options were not available in Affected Counties. While voters may have the opportunity to vote on Election Day at their precinct locations, they are not be able to same-day register on Election Day. The deadline to register to vote had already passed when Dorian made landfall, as had the deadline to request an absentee ballot. Voters who need to vote absentee by mail, due to disability or other reason that prevents them from physically voting at a voting site, do not have an alternative other than to send their ballot by mail or commercial carrier.

- 08 NCAC 01. 0106(c)(5), 01. 0106(c)(6), and 01 .0106(c)(7): The duration of the disruption includes a disruption to one-stop voting that occurred Wednesday, Thursday, and/or Friday of the last week of early voting in

Affected Counties. Mail disruptions are ongoing in some areas. Some voters remain displaced due to mandatory evacuation orders, power outages, and road closures. Some precinct officials will not be available to work on Election Day due to these and other issues.

The remedy in this Order extending early-voting hours is tailored to make up for the closures that occurred earlier in the week. However, it is not possible to make up for the early-voting closures in every county. Some county boards of elections do not have power or are not currently able to assess their voting sites. Some election workers cannot be reached or are no longer available to serve due to the disruption or because they were never scheduled to work over the weekend. County boards of elections are also preparing over the weekend and on Monday for Election Day on Tuesday. This includes uploading voter history from one-stop pollbooks, syncing and printing pollbooks for Election Day, and preparing other supplies for distribution to voting sites. The one-stop sites and hours provided for in this Order are what is assessed to be possible in the Affected Counties based on current information and conditions. This information may be imperfect due to changing conditions and limited time for decisionmaking.

- 08 NCAC 01. 0106(c)(8): There is not time for the General Assembly to respond since Election Day is on Tuesday, and one-stop voting must be extended today in order to occur tomorrow. The Executive Director transmitted a copy of Numbered Memo 2019-05 to the Governor, President Pro Tempore of the Senate, and Speaker of the House, and the political parties, on September 3, 2019, detailing preparations made by the agency prior to landfall of Dorian. The letter also cited the administrative rule permitting the executive director to exercise emergency powers in certain circumstances. Political parties have submitted correspondence to the Executive Director requesting certain extensions of one-stop voting.

- 08 NCAC 01. 0106(c)(9): Emergency remedial measures contained in this Order do not erode election integrity or ballot security. State Board staff have consulted with Affected Counties to ensure they will be able to securely carry out the directives in this Order. The remedies provided herein are specifically tailored to the circumstances based on what county boards of elections have reported is possible without compromising elections security or integrity.

- 08 NCAC 01. 0106(c)(10): Emergency remedial measures are not anticipated to affect certification deadlines.

7. In evaluating the disruption and establishing remedial effects, every effort has been made to treat similarly situated persons equally, while appropriately tailoring relief to offset the nature and scope of the disruption as required by law.

Based upon the foregoing findings and conclusions, and in exercise of G.S. § 163A-750 and 08 NCAC 01. 0106, the Executive Director hereby ORDERS:

A. Early voting, including same-day registration, is ordered to take place on Saturday, September 7, 2019, from 9 a.m. to 5 p.m., at the county board of elections office or in lieu of site in the following counties:

Beaufort	Greene	Onslow
Carteret	Hyde	Pamlico
Chowan	Jones	Pitt
Craven	Lenoir	

This directive modifies the schedule of one-stop early voting contained in G.S. § 163A 1300(b) and S.L. 2019-22 only, and in no other respect.

B. For all Affected Counties (all counties in Congressional District 3): Notwithstanding Numbered Memo 2019-03, canvass for Congressional District shall take place on Friday, September 20, 2019 at 11 a.m.

C. For all Affected Counties (all counties in Congressional District 3): Civilian absentee ballots delivered by mail or commercial courier service to the appropriate county board of elections office in any of the Affected Counties shall be counted if received no later than 5 p.m. on Wednesday, September 18, 2019, if the container-return envelope was postmarked on or before Election Day, September 10. This directive modifies the deadlines contained in G.S. § 163A 1310(b)(2) only, and in no other respect.

D. For all Affected Counties (all counties in Congressional District 3): In any precinct in an Affected County where, due to the effects of Dorian, the county board finds that an insufficient number of precinct officials are available to fill the majority of the three positions of chief judge and judges with residents of that precinct, the county board may appoint nonresidents of the precinct to a majority of the positions provided, that the officials otherwise meet all requirements.

This the 6th day of September, 2019.

Karen Brinson Bell
Executive Director
State Board of Elections

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THIRD EMERGENCY EXECUTIVE ORDER
Saturday, September 7, 2019
G.S. § 163A-750; 08 NCAC 01.0106

1. Hurricane Dorian ("Dorian") made landfall on or about September 5, 2019, damaging property and causing power outages across eastern North Carolina. The Governor of North Carolina declared a State of Emergency in anticipation of Dorian on August 31, 2019.

2. Due to the disruption caused by Hurricane Dorian, certain county boards of elections in Congressional District 9 and all county boards of elections in Congressional District 3 special election were closed for certain portions of the one-stop early voting period. These counties ("Affected Counties") are:

Bladen	Chowan	Lenoir
Cumberland	Craven	Onslow
Robeson	Currituck	Pamlico
Scotland	Dare	Pasquotank
Beaufort	Greene	Perquimans
Camden	Hyde	Pitt
Carteret	Jones	Tyrrell

3. The State Board of Elections ("State Board") staff continue to monitor the effects of Dorian across the State and remain in communication with state and federal partners, emergency response personnel, the U.S. Postal Service, and county elections administrators. This is the third executive order issued for the September 10 election, and additional executive orders may be issued if needed.

4. The State Board convened in open session on September 5, 2019. During that meeting, members of the State Board and the Executive Director discussed the effects of Dorian on voting populations and the September 10 special congressional election.

5. Statute provides that the Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in districts where the normal schedule has been disrupted by a natural disaster. G.S. § 163A-750(a)(1). The exercise of such powers must avoid unnecessary conflict with existing law. G.S. § 163A-750(a).

6. Administrative rules provide standards for the exercise of emergency powers. See 08 NCAC 01. 0106. Pursuant thereto, the Executive Director finds the following:

    a. 08 NCAC 01. 0106(a): Dorian and its aftermath have disrupted the normal schedule for the election and impaired critical components of election administration by displacing persons, damaging property, and disrupting the one-stop early voting period across the district. Each Affected County closed its one-stop sites for portions or all of the day on Wednesday, Thursday, and/or Friday of the last week of the early voting period.

    b. 08 NCAC 01. 0106(b)(1)(A): Hurricane Dorian is a qualifying natural disaster permitting the Executive Director to assess the propriety of emergency action.

    c. 08 NCAC 01. 0106(c): The Executive Director has defined the scope of the exercise of emergency power having considered the following:

        - 08 NCAC 01. 0106(c)(1): The geographic scope of disruption covers the entire Congressional District 3 and parts of Congressional District 3. Some Affected Counties experienced a more substantial disruption than other Affected Counties, but all Affected Counties experienced some disruption.

        - 08 NCAC 01. 0106(c)(2): Congressional District 3 spans the entire affected area. Congressional District 9 spans affected and non-affected areas. The remedies herein address only those portions of Congressional District 9 that were affected by Dorian.

        - 08 NCAC 01. 0106(c)(3): Only one day has passed since Dorian made landfall. While the disruption in advance of the election was foreseeable, the specific impacts of Dorian were not. The State Board has created a page on its website to inform the public about closures of early voting sites. Nevertheless, the types of disruptions addressed in this Order, including disruptions in one-stop voting, cannot be adequately addressed by public awareness.

        - 08 NCAC 01. 0106(c)(4): Alternative registration options were not available in Affected Counties. While voters may have the opportunity to vote on Election Day at their precinct locations, they are not be able to same-day register on Election Day. The deadline to register to vote had already passed when Dorian made landfall, as had the deadline to request an absentee ballot.

        - 08 NCAC 01. 0106(c)(5), 01. 0106(c)(6), and 01 .0106(c)(7): The duration of the disruption includes a disruption to one-stop voting that occurred Wednesday, Thursday, and/or Friday of the last week of early voting in

Affected Counties. Some voters remain displaced due to mandatory evacuation orders, power outages, and road closures. Some precinct officials will not be available to work on Election Day due to these and other issues.

The remedy in this Order extending early-voting hours is tailored to make up for closures that occurred earlier in the week that have not already been accounted for. However, it is not possible to make up for the early-voting closures in every county. Some county boards of elections do not have power or are not currently able to assess their voting sites. Some election workers cannot be reached or are no longer available to serve due to the disruption or because they were never scheduled to work over the weekend. County boards of elections are also preparing over the weekend and on Monday for Election Day on Tuesday. This includes uploading voter history from one-stop pollbooks, syncing and printing pollbooks for Election Day, and preparing other supplies for distribution to voting sites. The one-stop sites and hours provided for in this Order are what is assessed to be possible in the Affected Counties based on current information and conditions. This information may be imperfect due to changing conditions and limited time for decisionmaking.

- 08 NCAC 01. 0106(c)(8): There is not time for the General Assembly to respond since Election Day is on Tuesday, and one-stop voting must be extended today in order to occur tomorrow. The Executive Director transmitted a copy of Numbered Memo 2019-05 to the Governor, President Pro Tempore of the Senate, and Speaker of the House, and the political parties, on September 3, 2019, detailing preparations made by the agency prior to landfall of Dorian. The letter also cited the administrative rule permitting the executive director to exercise emergency powers in certain circumstances. Political parties have submitted correspondence to the Executive Director requesting certain extensions of one-stop voting.

- 08 NCAC 01. 0106(c)(9): Emergency remedial measures contained in this Order do not erode election integrity or ballot security. State Board staff have consulted with Affected Counties to ensure they will be able to securely carry out the directives in this Order. The remedies provided herein are specifically tailored to the circumstances based on what county boards of elections have reported is possible without compromising elections security or integrity.

- 08 NCAC 01. 0106(c)(10): Emergency remedial measures are not anticipated to affect certification deadlines.

7. In evaluating the disruption and establishing remedial effects, every effort has been made to treat similarly situated persons equally, while appropriately tailoring relief to offset the nature and scope of the disruption as required by law.

Based upon the foregoing findings and conclusions, and in exercise of G.S. § 163A-750 and 08 NCAC 01. 0106, the Executive Director hereby ORDERS:

A. Early voting, including same-day registration, is ordered to take place on **Sunday, September 8, 2019, from 12 p.m. to 3 p.m.**, at the county board of elections office in the following counties:

Camden	Dare	Perquimans
Currituck	Pasquotank	Tyrrell

This directive modifies the schedule of one-stop early voting contained in G.S. § 163A-1300(b) and S.L. 2019-22 only, and in no other respect.

B. For all Affected Counties (all counties in Congressional District 3, and Bladen, Cumberland, Robeson, and Scotland counties in Congressional District 9): Notwithstanding G.S. § 163A-821(b), the chair of each political party in an Affected County may submit the list of persons to be appointed as observers to the county board of elections by Sunday, September 8, 2019, at 5 p.m. This includes lists of precinct-specific and at-large observers. A political party chair who has already submitted a list of observers may update the list by this deadline. Lists may be submitted by fax, email, or in-person.

This the 7th day of September, 2019.

Karen Brinson Bell
Executive Director
State Board of Elections

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July 17, 2020

EMERGENCY ORDER

ADMINISTERING THE NOVEMBER 3, 2020 GENERAL ELECTION DURING THE GLOBAL COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY

As Executive Director, acting pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01 .0106, I hereby find the following:

1. On March 10, 2020, the Governor issued Executive Order No. 116, declaring a State of Emergency in response to the public health emergency posed by Coronavirus Disease 2019 (COVID-19).

2. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

3. On March 13, 2020, the President of the United States issued an emergency declaration for all states, tribes, territories, and the District of Columbia, retroactive to March 1, 2020, and declared that the COVID-19 pandemic in the United States constitutes a national emergency.

4. On March 25, 2020, the President approved a Major Disaster Declaration, FEMA-4487-DR, for the State of North Carolina.

5. On May 20, 2020, the Governor stated in Executive Order 141 that "slowing and controlling community spread of COVID-19 is critical to ensuring that the state's healthcare facilities remain able to accommodate those who require medical assistance." Executive Order 141 further states that, due to the "continued community spread of COVID-19 within North Carolina," the State must "continue some measures to slow the spread of the virus during the pandemic."

6. Executive Order 141 notes the determination of public health experts that that "the risk of contracting and transmitting COVID-19 is higher in settings that are indoors, where air does not circulate freely and where people are less likely to maintain social distancing by staying six feet apart." Executive Order 141 also notes that "the risk of contracting and transmitting COVID-19 is higher in settings where people are stationary and in close contact for long periods of time" and "in gatherings of larger groups of people because these gatherings offer more opportunity for person-to-person contact with someone infected with COVID-19."

7. The Secretary of the North Carolina Department of Health and Human Services has noted that scientific evidence suggests that the probability of COVID-19 transmission indoors is "approximately 18.7 times higher than in an open-air environment."[1]

8. As of July 16, 2020, North Carolina has had more than 93,426 laboratory-confirmed cases of COVID-19 and more than 1,588 deaths from the disease.[2]

9. As of the date of this Order, North Carolina's daily case counts of COVID-19 continue to increase, the percent of COVID-19 tests that are positive remains elevated, emergency-department visits for COVID-19-like illnesses are increasing, and hospitalizations for COVID-19 are increasing.[3]

10. COVID-19 infections in North Carolina are likely to continue for the next several months and into the fall, through at least Election Day.

11. In-person polling places, by their very nature, are venues where people may, without appropriate measures, congregate, often in close quarters, and sometimes for prolonged periods of time. As a result, it is critical that measures be taken to reduce the risk of COVID-19 transmission and to ensure, to the maximum extent possible, that voters are able to exercise their constitutional right to vote without undue risk.

12. Experiences from other states that have conducted elections during the pandemic are instructive. In Wisconsin, for example, following primary elections on April 7, researchers at the University of Wisconsin-Oshkosh and Ball State University found a "statistically and economically significant association between in-person voting and the spread of COVID-19 two to three weeks after the election." In addition, the study found that "consolidation of polling locations, and relatively fewer absentee votes, increased positive testing rates two to three weeks after the election."[4] The study's findings suggest that taking measures to reduce crowding at polling places is important to minimize the risk of COVID-19 transmission.

13. It has also been publicly reported that in Georgia, in primary elections held on June 9, 2020, there were "widespread problems" that led to lengthy delays and disruptions that were caused by the introduction of a new voting system, a "mass exodus of poll workers fearing coronavirus exposure," the forced closure of polling places due to insufficient staffing, and a

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1 Declaration of Mandy K. Cohen, MD, MPH, *North Carolina Bowling Proprietors Assn. v. Cooper*, No. 20 CVS 6422 (Wake Cty. Sup. Ct.), Dkt. 14.1, ¶ 40.

2 *See* North Carolina Department of Health and Human Services COVID-19 Response, *available at* https://covid19.ncdhhs.gov/.

3 *See* North Carolina Department of Health and Human Services COVID-19 Dashboard, *available at* https://covid19.ncdhhs.gov/dashboard.

4 Cotti, Chad D. and Engelhardt, Bryan and Foster, Joshua and Nesson, Erik and Niekamp, Paul, *The Relationship between In-Person Voting, Consolidated Polling Locations, and Absentee Voting on COVID-19: Evidence from the Wisconsin Primary* (May 10, 2020), *available at* SSRN: https://ssrn.com/abstract=3597233.

"crush of absentee ballot requests."[5] In several locations, these problems led to hours-long delays in in-person voting on Election Day,[6] further increasing both inconvenience and risk to voters and poll-workers. It has been publicly reported that Nevada and South Carolina also experienced similar delays and disruption.[7] Pennsylvania and Washington, D.C. experienced delays during their primary elections as well; in Washington D.C., only 20 of its typical 143 polling places opened, with reported wait times at each location of more than an hour around 7:30 p.m. on election day during a citywide curfew and in Philadelphia, only 190 of 831 polling places were opened.[8]

14. On June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[9] The CDC guidance encourages elections officials to:

- Ensure that "poll workers who are sick, have tested positive for COVID-19, or have recently had a close contact with a person with COVID-19" stay home.

- "Provide an alcohol-based hand sanitizer with at least 60% alcohol for use at each step in the voting process where voters interact with poll workers, after using the voting machine, and as the final step in the voting process."

- Use "physical barriers, such as plexiglass shields, that can be used to protect workers and voters when physical distance cannot be maintained."

- "Recommend and reinforce the use of cloth face coverings among all workers" and "encourage voters to use cloth face coverings while in the polling location."

- Ensure adequate supplies, including soap, hand sanitizer, paper towels, tissues, disinfectant wipes, and no-touch trash cans, to support healthy hygiene.

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5 Gardner, Amy and Lee, Michelle Ye Hee and Boburg, Shawn, *Voting debacle in Georgia came after months of warnings went unaddressed*, The Washington Post (June 19, 2020), *available at* https://www.washingtonpost.com/politics/voting-debacle-in-georgia-came-after-months-of-warnings-went-unaddressed/2020/06/10/1ab97ade-ab27-11ea-94d2-d7bc43b26bf9_story.html.

6 *Id.*

7 *Id.*

8 Gardner, Amy and Viebeck, Elise and Pompilio, Natalie, *Primary voters in 8 states and D.C. faced some confusion, long lines and poor social distancing*, The Washington Post (June 2, 2020), *available at* https://www.washingtonpost.com/politics/in-pennsylvania-officials-prepare-for-coronavirus-civil-unrest-to-disrupt-tuesday-primary/2020/06/02/96a55c40-a4be-11ea-b619-3f9133bbb482_story.html.

9 *Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19),* The Centers for Disease Control and Prevention (June 22, 2020), *available at* https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

- Disinfect all surfaces "frequently touched by multiple people" and clean and disinfect voting-associated equipment. "After the polling location closes, clean and disinfect" all equipment and transport cases.

- "Where possible, replace shared objects like pens or ballot-activation cards with single-use objects" and headphones for voters with disabilities.

- "Encourage voters to stay at least six feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained.

- Increase the number of polling locations available for early voting and extend hours of operation at early voting sites.

- Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance.

- Minimize lines as much as possible, especially in small, indoor spaces.

- "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility."

- "To ensure sufficient space for social distancing and other measures, identify larger facilities for use as polling places."

- Notify voters of changes to polling operations, including the availability of alternative voting options that minimize contact.

- Offer alternatives to in-person voting.

- Offer early voting or extended hours, where voter crowds may be smaller throughout the day.

- Offer alternative voting options that minimize exposure between poll-worker and voters for voters with symptoms, those who are sick, or known COVID-19 positive.

15. The COVID-19 pandemic is a major health emergency across all regions of North Carolina, affecting North Carolinians statewide.[10]

16. Because the COVID-19 pandemic affects North Carolinians across local jurisdictional boundaries, it is critical that health and safety measures instituted by county boards

[10] *See* North Carolina Department of Health and Human Services COVID-19 Dashboard, *available at* https://covid19.ncdhhs.gov/dashboard.

of elections not conflict and are coordinated with statewide measures to ensure adequate protection for lives of North Carolina voters. Therefore, I have determined that it is necessary to take action and give direction to county boards of elections to ensure adequate protection for lives of North Carolinians.

17. The State Board and county boards of elections are already well underway with actively preparing to conduct the November 3, 2020 general election in accordance with state and federal law. For example, county boards were directed to submit one-stop early voting plans to the State Board by July 31, 2020. Some counties have already submitted plans. However, the COVID-19 pandemic is disrupting and will continue to disrupt the normal schedule for this election cycle in every county in the state, and has impaired critical components of election administration. These impairments include significantly increasing the difficulty for county boards to identify and train adequate numbers of poll-workers and one-stop workers who can safely assist with in-person registration and voting activities, and allow for voters to cast ballots without subjecting themselves to serious health risks. To address these impairments, county boards of elections can take actions that reduce crowd density, shorten the time voters spend in line and at polling locations, and improve sanitation and cleanliness.

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.

20. State public health officials have cited data that show that the continuing spread of COVID-19 within North Carolina is on an upward trend.[11] They have informed me that the spread will likely continue for at least several months, through the November 3, 2020 general election date, and across the State. Pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01 .0106(c)(1) and (2), I have determined that these disruptions to administering the November 3, 2020 general election have already affected and will continue to affect the entire State and all contests. As of the date of this Order, I have determined that, pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01 .0106(c)(5), it is not clear when or if the disruptions to the normal schedule for the November 3, 2020 general election will end. Because of the advance planning necessary to address multiple components of election administration, pursuant to N.C. Gen. Stat.

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[11] *See* North Carolina Department of Health and Human Services COVID-19 Dashboard, *available at* https://covid19.ncdhhs.gov/dashboard.

§ 163-27.1 and 08 NCAC 01 .0106(c)(3), (8), and (10), I have determined that certain emergency measures need to be identified now to ensure that there is adequate time to meet State and federal deadlines, particularly in light of the upcoming deadline for county boards to submit their one-stop absentee voting plans. Impacted aspects of election administration include procuring necessary supplies, ensuring adequate staffing, and securing adequate facilities and infrastructure.

21. Because there is a higher risk of transmission of the COVID-19 virus indoors and in areas where people come in close contact, pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106(c)(4) and (6), the State Board and county boards of elections must make arrangements to ensure the existence of safe in-person voting opportunities and safe spaces for election workers so as to reduce, to the maximum extent possible, displacement of voters or election workers. Pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106(c)(7), I have determined that the high risk of transmission in close contact also requires that the State Board and county boards of elections ensure that there are sufficient voting locations and election workers to ensure that every eligible North Carolinian has the ability to vote without endangering herself.

22. Without sufficient measures to ensure that all eligible North Carolinians can vote safely, the integrity of the elections may be compromised. To avoid the disenfranchisement of eligible voters and to protect the health and safety of election workers and voters, pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01 .0106(c)(9), I have determined that the State Board and county boards of elections must put in place measures that will protect against the contraction and spread of COVID-19 while voting is taking place.

Based on the foregoing findings and conclusions, by the authority vested in me as Executive Director by N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01 .0106, IT IS ORDERED:

1. All county boards of elections shall open each one-stop early voting site in their county for a minimum of ten hours total for each of the first and second weekends of the 17-day early voting period. A county-board office or in-lieu-of site (as defined in N.C. Gen. Stat. § 163-227.6) that is open only during regular business hours shall be excluded from the requirement in this paragraph, provided that there is at least one other one-stop site in the county.

2. Each county board of elections shall open at least one one-stop early voting site per 20,000 registered voters in the county, as reflected in the voter registration records as of July 11, 2020. A county board of elections may apply to the Executive Director for a waiver of the requirement in this paragraph if its proposed plan is sufficient to serve the voting population, maintain social distancing and reduce the likelihood of long lines.

3. Any county board of elections that only has only one one-stop early voting site shall arrange for a backup site and backup staff in the event that its site must be shut down or in the event that there is a lack of sufficient staffing due to COVID-19.

4. Any county board of elections may open its sites earlier than 8:00 a.m. and/or may stay open later than 7:30 p.m., provided that the sites (other than the county-board office or in-lieu-of site, if only open regular business hours) are all open at the same time.

5. All county boards of elections shall post visible signage outside each one-stop site to inform voters of the location and hours of all one-stop sites in the county so voters can assess, while abiding by social distancing guidelines outside the polling location, whether to go to a different location.

6. If a county board of elections learns that one of its polling places for a precinct is inaccessible because of the COVID-19 pandemic, the county board of elections may request a transfer of some voters to an adjacent precinct. The request is subject to approval by the Executive Director and shall explain why the partial transfer is necessary due to the COVID-19 pandemic and how the proposal is consistent with the criteria in N.C. Gen. Stat. § 163-130.2(3)-(7). The request must be received at least 45 days prior to the election. No later than 30 days prior to the election, the county board of elections shall mail a notice of precinct change to each registered voter who, as a result of the change, will be assigned to a different voting place.

7. All county boards shall:

   a. Provide for social distancing at voting sites, including by applying appropriate markings and providing appropriate barriers, including barriers between elections officials and voters at check-in;

   b. Provide for frequent sanitation of common surfaces, hand-sanitizer, and single-use ballot-marking devices;

   c. Require that elections officials wear face coverings, and make face coverings available to voters who do not bring their own. Voters will not be required to wear a face covering to vote;

   d. Require face shields or partitions and gloves for all election officials where appropriate for the task.

8. The State Board shall provide a centralized location on its website for precinct-consolidation information throughout the voting period.

9. As Executive Director, I will disseminate additional guidance on the measures described here in Numbered Memos.

10. If any provision of this Order or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of the Order which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this order are declared to be severable.

11. This order will be in effect immediately and will remain in effect through 11:59 p.m. on November 4, 2020 unless repealed, replaced, or rescinded by another Emergency Order. Further emergency orders may be issued to address other components of election administration that may be impaired as necessary.

This 17th day of July, 2020.

Karen Brinson Bell
Executive Director
North Carolina State Board of Elections

NORTH CAROLINA
State Board of Elections

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KIM WESTBROOK STRACH
Executive Director

NUMBERED MEMO 2016-21

TO: County Boards of Elections
FROM: Kim Strach, Executive Director
RE: Voter Registration Processing and Election Observer Requirements
DATE: October 19, 2016

This memorandum provides guidance to address questions regarding voter registration and election observer requirements. For additional information on observer conduct, see Numbered Memo 2016-17 and Tips for Observers and Runners.

Voter Registration Deadline

We have received many questions about voter registration processing in light of the extension of the voter registration deadline in 37 counties. I am certain that many of you spent your weekend processing voter registration applications that were received by Friday, October 14. And, due to the mail delays associated with Hurricane Matthew, it is likely most counties will be processing voter registration applications through today. For those 37 counties with the extended voter registration deadline, it may be impossible to process applications received today before voting begins tomorrow. Additionally, voter registrations will be timely in those 37 counties if postmarked by today. If the postmark is missing or illegible on forms received in those 37 counties, the forms must be received in your office by Monday, October 24.

The grid below is meant to highlight the differences between the 37 Matthew counties and those counties that did not have an extended voter registration deadline (Non-Matthew counties).

	Matthew Counties	Non-Matthew Counties
Voter registration deadline	**10/19/2016**	**10/14/2016**
Source: received by mail with postmark date	Postmark dated 10/19/2016 or earlier	Ignore postmark date if received by 10/19/2016 (if received after 10/19/16 it must be postmarked by 10/14/16)
Source: received by mail with missing or illegible postmark date	Must be received by 10/24/2016	Ignore postmark date through receipt by 10/19/2016

Source: NVRA **(includes received by mail from the agency)**	10/19/2016 – signed or transaction date	10/14/2016 – signed or transaction date
Source: In-person	10/19/2016, close of business	10/14/2016, close of business
Source: Fax or Email	10/19/2016, close of business Must receive originals for new registrations or party changes by 10/24/2016	10/14/2016, close of business Must receive originals for new registrations or party changes by 10/19/2016

Processing Voter Registration Applications

In many counties you will be processing new voter registrations after you have started early voting tomorrow. This will be in addition to the statutory requirement to process same day registrations within 48 hours of registration. If you are continuing to process voter registrations received timely in accordance with the grid above, please ensure that the data is being transferred in order for your OS site laptops to be up-to-date.

Handling voters that present to vote before applications are processed

If a voter presents during the one-stop early voting period and advises the poll worker that they have submitted a registration application in compliance with the deadline, you should process this voter as a same day registration. However, if the voter does not possess proof of residence in order to complete an SDR process, allow the voter to vote a provisional ballot with the reason being "no record of registration" as on Election Day.

Best Practice for ensuring compliance with HAVA

Voter registration applicants that don't provide their driver's license number or last four of their Social Security number must provide HAVA identification when voting for the first time. If voter registration applications have not been processed and the voter did not provide either of those identifications on their application, that voter will not be flagged as needing to show HAVA identification. Therefore, if you are not going to be able to process all of your voter registrations, please prioritize those applications that omit both a driver's license number and last four of the Social Security number. This will allow these voters to be flagged in the poll book and they can be advised they need to provide HAVA identification prior to the county canvass.

Submission of Observer Lists

The chair of each political party in the county may designate two observers to attend each voting place in a primary or general election. In addition, the party chair may designate 10 additional at-large observers who may attend any voting place in that county. G.S. § 163-45(a).

The party chair must provide a written, signed list of at-large observers to the county director of elections prior to 10:00 a.m. on the fifth day prior to any primary or general election. The party chair must submit a written, signed list of the observers appointed for each precinct to the chief judge of each precinct prior to 10:00 a.m. on the fifth day prior to any primary or general election; *the list may be delivered in care of the county director of elections if desired*. In addition, the party chair must submit two written, signed copies of the precinct-specific and at-large observer lists to the chair of the county board of elections prior to 10:00 a.m. on the fifth day prior to any primary or general election. Please note that the *writing* requirement does not rule-out electronic submission by facsimile or email. It is best practice to communicate with local party officials and coordinate the most optimal method by which the party may communicate its selections.

For observers at early voting sites, the list provided must designate which observers will be present on each day of early voting at each early voting site. It is insufficient for the party chair to merely provide a list of all who observers who might be present at any given site throughout the early voting period.

Who May Serve as an Observer

Observers must be registered voters of the county in which the voting place is located and must possess good moral character. G.S. § 163-45(a). Although the statute does not explicitly prohibit someone who is serving as an election official from also being designated as a political party observer when they are not scheduled to work as an election official, an official who serves as a designed party observer, even at a site other than the one to which the official is assigned to serve, runs the risk of casting his or her impartiality in doubt. For that reason, it is strongly recommended that you advise election officials to consider carefully their oath and controlling state law and to make every effort to avoid the appearance of partiality. <u>It is best practice to instruct your chief judges to check identification for those who appear at the polls claiming to be appointed observers.</u>

Number of Observers in the Voting Enclosure

No more than two precinct-specific observers from each political party may be in the voting enclosure at any time. Only one at-large observer from each political party may be in the voting enclosure at any time, even if no precinct-specific observers are present. All observers, whether precinct-specific or at-large, may be relieved after serving no less than four hours. G.S. § 163-45(a). This means that at least four hours must have passed since the observer began serving before a replacement observer can take over from the prior observer.

Observer Conduct

Observers at the voting place are prohibited from wearing or distributing campaign material or making any political comments. Observers are also prohibited from impeding the voting process, speaking with voters and assistants, or interfering with the privacy of the voter. An observer may not photograph, video, or record a voter without the consent of the voter and the chief judge. Observers are permitted to make observations, take notes, and use personal electronic devices for a non-prohibited purpose as long as they are not disruptive to voters or elections officials.

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9805

2018 AUG 21 P 5:19

ROY A. COOPER, III, in his official Capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER ON INJUNCTIVE RELIEF

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA,

Plaintiffs,

v.

TIMOTHY K. MOORE, in his official capacity; PHILIP E. BERGER, in his official capacity; THE NORTH CAROLINA BIPARTISAN BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, JOSHUA A. ("ANDY") PENRY, in his official capacity; JOSHUA MALCOM, in his official capacity; KEN RAYMOND, in his official capacity; STELLA ANDERSON, in her official capacity; DAMON CIRCOSTA, in his official capacity; STACY EGGERS IV, in her official capacity; JAY HEMPHILL, in his official capacity; VALERIE JOHNSON, in her official capacity; and JOHN LEWIS, in his official capacity,	ORDER ON INJUNCTIVE RELIEF
Defendants.	

THESE MATTERS CAME ON TO BE HEARD before the undersigned three-judge panel on August 15, 2018. All adverse parties to these actions received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, briefs and arguments of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

THE COURT, in the exercise of its discretion and for good cause shown, and by consent, makes the following findings of fact and conclusions of law:

1. As an initial matter, in order to promote judicial efficiency and expedition, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

STANDING OF PLAINTIFFS

2. Defendants 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 (hereinafter "Legislative Defendants") do not contend, nor do we otherwise conclude, that Plaintiff Governor Roy A. Cooper (hereinafter "Governor Cooper") lacks standing to bring a separation of powers challenge in this case. Indeed, "if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim." *Cooper v. Berger*, 370 N.C. 392, 412, 809 S.E.2d 98, 110 (2018).

3. Legislative Defendants have, however, filed a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure asserting that Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People (hereinafter "NC NAACP") and Plaintiff Clean Air Carolina (hereinafter "CAC") lack standing to bring a challenge to the Session Laws at issue in this matter.

4. NC NAACP contends that it has standing to bring its claims on behalf of its members, citing to the core mission of the organization to advance and improve the political, educational, social and economic status of minority groups, the elimination of racial inequality and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination. (Plaintiffs' Amended Complaint ¶ 8). In order for NC NAACP to have standing to challenge the proposed amendments on behalf of its individual members, each individual member must have standing to sue in his or her own right. *Creek Pointe Homeowners Ass'n v. Happ*, 146 N.C. App. 150 (2001)

(citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). This showing has not been made here. NC NAACP has not demonstrated that each individual member is a registered voter in North Carolina or that each individual member is a member of a minority group.

5. NC NAACP does, however, have standing to bring its claims on behalf of the organization itself. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). The claims asserted by NC NAACP with respect to the language of the proposed amendments directly impact the ability of the organization to educate its members of the likely effect of the proposed legislation which is pertinent to the organization's purpose. The undersigned three-judge panel therefore concludes that NC NAACP does have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

CAC has not asserted the right to bring its claim on behalf of its members. In order to have standing on its own behalf, CAC must demonstrate that the legally protected injury at stake is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The requirement of particularity has not been met here. The general challenge of informing its members of the effects of the proposed legislation is not an injury particularized to CAC, whose stated mission is

"to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices. (Plaintiffs' Amended Complaint ¶ 11).

The specific injuries set forth by CAC concern the merit of the proposed amendments rather than the manner in which the amendments will appear on the ballot. The courts are not postured to consider questions which involve "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Cooper v. Berger*, 370 N.C. 392, 809 S.E. 2d 98 (2018) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). Article XIII, Section 4 of the North Carolina Constitution expressly grants the North Carolina General Assembly (hereinafter "General Assembly") the authority to initiate the proposal of a constitutional amendment. This authority exists notwithstanding the position of the courts on the wisdom or public policy implications of the proposal. The undersigned three-judge panel therefore concludes that CAC does not have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is granted as to CAC.

POLITICAL QUESTION DOCTRINE

3. Governor Cooper, cross-claimant Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "the Bipartisan Board"), and the NAACP have asserted facial challenges to the constitutionality of acts of the General Assembly. Contentions of these claims constituting facial challenges to the constitutionality of acts of the General Assembly are within the statutorily-provided jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1; N.C.G.S. § 1A-1, Rule 42(b)(4). All other matters will be remanded, upon finality of any orders entered by this three-judge panel, to the Wake County Superior Court for determination.

9. Legislative Defendants have filed a motion under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure in both cases, asserting that the undersigned three-judge panel lacks subject matter jurisdiction on the theory that the claims constitute non-justiciable political questions. A majority of the three-judge panel has concluded that Governor Cooper's facial constitutional challenges, as expressed, present justiciable issues as distinguished from "a non-justiciable political question arising from nothing more than a policy dispute," *Cooper*, 370 N.C. at 412, 809 S.E.2d at 110, and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is denied as to Governor Cooper.

10. Likewise, a majority of this panel has concluded that NC NAACP's facial constitutional challenges, as expressed, present a justiciable issue as distinguished from a non-justiciable political question and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

NC NAACP "USURPER LEGISLATIVE BODY" CLAIM

11. NC NAACP has also asserted a claim that the General Assembly, as presently constituted, is a "usurper" legislative body whose actions are invalid. While this panel acknowledges the determinations made in this regard in *Covington v. North Carolina*, 270 F. Supp. 3d 881 (2017), we conclude that this claim by NC NAACP in this action constitutes a collateral attack on acts of the General Assembly and, as such, is not within the jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1. We therefore decline to consider NC NAACP's claim that the General Assembly, as presently constituted, is a "usurper" legislative body.

12. Furthermore, even if NC NAACP's claim on this point was within this three-judge panel's jurisdiction, the undersigned do not at this stage accept the argument that the General Assembly is a "usurper" legislative body. And even if assuming NC NAACP is correct,

a conclusion by the undersigned three-judge panel that the General Assembly is a "usurper" legislative body would result only in causing chaos and confusion in government; in considering the equities, such a result must be avoided. *See Dawson v. Kendrick*, 527 F. Supp. 252 (S.D. W. Va. 1981). For the reasons stated above, we decline to invalidate any acts of this General Assembly as a "usurper" legislative body.

THE PROPOSED AMENDMENTS AND BALLOT LANGUAGE[1]

13. On June 28, 2018, the General Assembly enacted Session Law 2018-117 (hereinafter the "Board Appointments Proposed Amendment"), Session Law 2018-118 (hereinafter the "Judicial Vacancies Proposed Amendment"), Session Law 2018-119 (hereinafter the "Maximum Tax Rate Proposed Amendment") and Session Law 2018-128 (hereinafter "Photo Identification for Voting Proposed Amendment"). Each Session Law contains the text of proposed amendments to the North Carolina Constitution. *See* 2018 N.C. Sess. Laws 117 §§ 1-4; 2018 N.C. Sess. Laws 118 §§ 1-5; 2018 N.C. Sess. Laws 119 §§ 1-4; 2018 N.C. Sess. Laws 128 § 1.2. Each Session Law also contains the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. *See* 2018 N.C. Sess. Laws 117 § 5; 2018 N.C. Sess. Laws 118 § 6; 2018 N.C. Sess. Laws 119 § 2; 2018 N.C. Sess. Laws 128 § 3.

14. Governor Cooper and State Board of Elections have asserted claims that the sections containing the ballot language in S.L. 2018-117 and S.L. 2018-118 are facially in violation of the North Carolina Constitution. NC NAACP also has asserted claims that these

[1] In the following, full quotations of the proposed amendments, underlined text in the proposed amendments represents additions to the North Carolina Constitution, ~~strikethrough~~ text in the proposed amendments represents language to be removed from the North Carolina Constitution, and text that is not otherwise underlined or struck through represents already-existing language of the North Carolina Constitution that will remain unchanged. The proposed amendments are displayed in this manner so that it is readily apparent what is proposed to be added to and removed from the North Carolina Constitution.

same sections containing the ballot language, as well as in S.L. 2018-119 and S.L. 2018-128, are facially in violation of the North Carolina Constitution.

[illegible] Section 1 of S.L. 20[illegible] proposes to amend Article VI of the North Carolina Constitution by adding [illegible] to read:

"§ 11. Bipartisan State Board of Ethics and Elections Enforcement.

(1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and election laws, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only but shall exercise all of its powers independently of the Executive Branch.

(2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members shall be registered with the same political affiliation, if defined by general law. Appointments shall be made as follows:

(a) Four members by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, from nominees submitted to the President Pro Tempore by the majority leader and minority leader of the Senate, as prescribed by general law. The President Pro Tempore of the Senate shall not recommend more than two nominees from each leader.

(b) Four members by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, from nominees submitted to the Speaker of the House by the majority leader and minority leader of the House of Representatives, as prescribed by general law. The Speaker of the House of Representatives shall not recommend more than two nominees from each leader."

2018 N.C. Sess. Laws 117, § 2

[illegible] Section 2 of S.L. 2018-[illegible] proposes to amend Article I, Section 6 of the North Carolina Constitution by rewriting the section to read as follows:

"**Sec. 6. Separation of powers.**

(1) The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

(2) The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission."

2018 N.C. Sess. Laws 117, § 2.

17. Section 3 of S.L. 2018-117 proposes to amend Article II, Section 20 of the North Carolina Constitution by rewriting the section to read as follows:

"Sec. 20. Powers of the General Assembly.

(1) Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

(2) No law shall be enacted by the General Assembly that appoints a member of the General Assembly to any board or commission that exercises executive or judicial powers."

2018 N.C. Sess. Laws 117, § 3.

18. Section 4 of S.L. 2018-117 proposes to amend Article III, Section 5 of the North Carolina Constitution by rewriting the section to read as follows:

"Sec. 5. Duties of Governor.

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed. In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of any board or commission, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.

...

(8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for. The legislative delegation provided for in Section 6 of Article I of this Constitution shall control any executive, legislative or judicial appointment and shall be faithfully executed as enacted."

2018 N.C. Sess. Laws 117, § 4.

19. Section 5 of S.L. 2018-117 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 3 and 4 of S.L. 2018-117 to the qualified voters of the State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-117 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority.

2018 N.C. Sess. Laws 117, § 5.

Section 1 of S.L. 2018-118 proposes to amend Article IV of the North Carolina Constitution by adding a new section to read:

Sec. 23. Merit selection; judicial vacancies.

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect,

in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice when duly assigned to hold court in an interim capacity and shall serve until the earliest of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced as prescribed by law.

2018 N.C. Sess. Laws 118, §1.

. Section 2 of S.L. 2018-118 proposes to amend Article IV, Section 10 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 10. District Courts.

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the County, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

2018 N.C. Sess. Laws 118, § 2.

22. Section 3 of S.L. 2018-118 proposes to amend Article IV, Section 18 of the North Carolina Constitution by adding a new subsection to read:

(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term for which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

2018 N.C. Sess. Laws 118, § 3.

23. Section 4 of S.L. 2018-118 repeals in its entirety Article IV, Section 19 of the North Carolina Constitution, which currently reads as follows:[1]

Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

2018 N.C. Sess. Laws 118, § 4.

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[1] For the sake of clarity, this section is not displayed as ~~struck-through~~ despite the proposed amendment duly removing the language from the North Carolina Constitution.

2. Section 5 of S.L. 2018-118 proposes to amend Article II, Section 22, Subsection (5) of the North Carolina Constitution by rewriting the subsection to read as follows:

> (5) Other exceptions. Bills shall:
>
> (a) In which the General Assembly makes an appointment or appoints a person to office and which contains no other matter;
>
> (b) Revising the Senate districts and the apportionment of Senators among those districts and containing no other matter;
>
> (c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; ~~or~~
>
> (d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other matter, or,
>
> (e) Electing a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution; or
>
> (f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution,
>
> shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

2018 N.C. Sess. Laws 118, § 5.

3. Section 6 of S.L. 2018-118 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-118 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-118 to read as follows:

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.

2018 N.C. Sess. Laws 118, § 6.

4. Section 7 of S.L. 2018-119 proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 2. State and local taxation.

(6) Income tax. The rate of tax on incomes shall not in any case exceed ~~ten~~ seven percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

2018 N.C. Sess. Laws 119, § 1.

Section 2 of S.L. 2018-119 contains the language to be included on the 2018 general election ballot submitting the proposed amendment in Section 1 of S.L. 2018-119 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-119 to read as follows:

[ ] FOR [ ] AGAINST
Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%).

2018 N.C. Sess. Laws 119, § 2.

Section 1 of S.L. 2018-128 proposes to amend Article VI, Section 2 of the North Carolina Constitution by adding a new subsection to read:

(4) Photo identification for voting in person. Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

2018 N.C. Sess. Laws 128, § 1.

Section 1 of S.L. 2018-128 proposes to amend Article VI, Section 3 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 3. ~~Registration.~~Registration; Voting in Person.
(1) Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.
(2) Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

2018 N.C. Sess. Laws 128, § 2.

30. Section 3 of S.L. 2018-128 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-2 of S.L. 2018-128 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-128 to read as follows:

[ ] FOR [ ] AGAINST
Constitutional amendment to require voters to provide photo identification before voting in person.

2018 N.C. Sess. Laws 128, § 3.

Guiding Legal Principles

31. The analytical framework for reviewing a facial constitutional challenge is well-established. *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016). Acts of the General Assembly are presumed constitutional, and courts will declare them unconstitutional only when [it is] plainly and clearly the case. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Gleason v. Bd. Of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). The party alleging the unconstitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). "This is a rule of law which binds us in deciding this case." *Id.*

32. In considering these facial constitutional challenges, this panel understands and applies the following principles of law to the analysis: We presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt. The constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the

constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

34. Article I of the North Carolina Constitution declares that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Article I also declares that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States." N.C. Const. art. I, § 3. Article I also preserves the right to due process of law, declaring that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property but by the law of the land." N.C. Const. art. I, § 19. Finally, Article I declares that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

35. Article XIII of the North Carolina Constitution provides that "[t]he people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way." N.C. Const. art. XIII, § 2. The two permitted methods to amend the Constitution require an amendment to be proposed by a "Convention of the People of this State," or by the General Assembly. N.C. Const. art. XIII, §§ 3, 4.

36. An amendment to the Constitution "may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the

proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly." N.C. Const. art. XIII, § 4.

These provisions of the North Carolina Constitution make plain and clear a number of points: first, the power to govern in this State, including the power to write, revise, or abolish the Constitution is vested in the **people** of this State, founded upon the **will of the people**; second, the General Assembly may initiate a proposal for one or more amendments to the Constitution by adopting and submitting the proposal to the voters. The General Assembly has exclusive authority to determine the time and manner in which the proposal is submitted to the voters, but ultimately the issue must be submitted to the voters for ratification or rejection, whereupon the will of the people, expressed through their votes, will determine whether or not the proposal becomes law.

Finally, while the constitutional provision or standard for interpretation of the North Carolina Constitution, the State Board of Elections is required by our State's general statutes to "ensure that official ballots throughout the State have all the following characteristics: (1) Are readily understandable by voters. (2) Present all candidates and questions in a fair and nondiscriminatory manner." N.C.G.S. § 163A-1108. We note that while the State Board of Elections has asserted a cross-claim based upon these statutory requirements in N.C.G.S. § 163A-1108, such a claim is not within the jurisdiction of a three-judge panel constituted under N.C.G.S. § 1-267.1. The undersigned three-judge panel has therefore not considered this statutorily-based claim.

Issue Presented

38. The ultimate question presented to this three-judge panel by the facial constitutional challenges requires this panel to decide whether or not the language contained in the ballot questions adopted by the General Assembly satisfies the constitutional mandate that proposed amendments be submitted to the voters for ratification or rejection.

39. In addressing this issue, the Legislative Defendants have argued that the issue might better be decided after the November election rather than before and that the issue might even become moot, depending upon the outcome of the vote. We are compelled, however, in conducting our analysis, to do so through a neutral lens and to do so without considering the wisdom or lack thereof of the proposed amendments. The question is not whether the voters *should* vote for or against the measures, but whether the voters in this State have had a fair opportunity to declare themselves upon this question. *Hill*, 176 N.C. at 584, 97 S.E. at 503.

Applicable Legal Standards When Examining Ballot Language

40. We are aware that our courts have not previously addressed a situation exactly like the one presented here. As a result, this panel must rely on principles of constitutional interpretation established by our courts, including the text of the Constitution and accepted canons of construction, as well as the historical jurisprudence of our courts on similar issues. Other courts provide persuasive, but not authoritative guidance in analysis of challenged ballot proposal language.

41. Since 1776 our constitutions have recognized that all political power resides in the people. N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights § 1. Presently, our constitutional jurisprudence provides that "the General Assembly is checked and balanced by its structure and its accountability to the people." *State ex rel. McCrory*

v. Berger, 368 N.C. 533, 653, 781 S.E.2d 248, 261 (2016) (Newby, J. concurring in part and dissenting in part) (emphasis added). In order to amend the constitution, the amendment must "be submitted to the qualified voters of this State," N.C. Const. art. II, § 22. Notably, "the object of all elections is to ascertain fairly and truthfully, the will of the people," *Wilmington, C. & E.C.R. Co. v. Onslow Cty. Comm'rs*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895).

42. Legislative Defendants submit that this panel should apply a substantive due process standard in determining whether or not the language of the Ballot Questions satisfies constitutional requirements (i.e., "When the ballot language provides sufficiently the proposed amendment by briefly summarizing the text, then substantive due process is satisfied and the election is not patently and fundamentally unfair so long as the summary does not so plainly mislead voters about the text of the amendment that they do not know what they are voting for or against, that is, they do not know which amendment to be for or against." *Sprague v. Cortes*, 223 F.Supp. 3d 248, 295 (M.D. Pa. 2016). A majority of this panel concludes that this standard, though relevant, is not determinative to an issue decided by state courts under our state constitution.

43. A majority of this panel instead concludes that the requirements of our state constitution are more appropriately gleaned from the decisions of state courts, and in particular our own Supreme Court. In *Hill v. Lenoir County*, 176 NC 572, 98 (1918), our Supreme Court said: "In elections of this character great particularity should be required in the notice in order that the voters may be *fully informed of the question they are called upon to decide*. There is high authority for the principle that even where there is no question as to the form in which the question is submitted to the voters it is essential that it be stated in such manner as to inform

them *intelligently to express their opinion upon it*[.]" *Id.* at 578, 97 S.E. at 500-01 (emphasis added).

Drawing from the requirements expressed in *Hill*, as well as analyses from other jurisdictions, a majority of this panel find that relevant considerations include 1) whether the ballot question clearly makes known to the voter what he or she is being asked to vote upon, 2) whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment, and 3) whether the language used in the ballot question implies a position in favor of or opposed to the proposed amendment. See *Stop Slots MD 2012 v. State Bd. of Elections*, 424 Md. 163, 208, 34 A.3d 1164, 1191 (2012) (noting that ballot questions need to be determined on what would put an "average voter" on notice of "the purpose and effect of the amendment"); *Donaldson v. Dep't of Transp.*, 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992) (establishing that the courts must "presume that the voters are informed" but the legislature should still "strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each . . . amendment"); *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 668 (Fl. 2010) (noting that lawmakers, as well as the voting public, "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be"); *State ex rel. Voters First v. Ohio Ballot Bd.*, 130 Ohio St. 3d 377, 958 N.E.2d 142, 2011-Ohio-6 (noting that material omissions in the ballot language of a proposed amendment to the Ohio constitution deprived the voters of the right to know what they were voting upon).[3]

[3] One of the cases cited by Legislative Defendants, *Williams v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974), which included the following language:

"Though we hold that the ballot language is not a proper subject for more than this minimal judicial review we must note that to the extent to which the legislature describes proposed amendments in any way other than through the most objective and brief of terms...it exposes itself to the temptation—yielded to here, we think—to interject its own value judgments concerning the amendments into the ballot language and thus to propagandize the voters in the very voting booth in denigration of the integrity of the ballot." 232 Ga. at 556, 208 S.E.2d at 100.

45. In the present case, as in *Hill,* there can be no doubt that our General Assembly has the exclusive power and authority to initiate a proposal for a constitutional amendment and to specify the time and manner in which voters of the State are presented with the proposal. But the proposal must be "submitted" to the voters. According to the Merriam Webster Dictionary, "submit" means "to present or propose to another for consideration" or "to submit oneself to the authority or will of another." In order for the proposals to be submitted to the will of the people, the ballot language must comply with the constitutional requirements as expressed in *Hill.*

46. With those legal principles in mind, we now turn our attention to the particular issues presented by the present litigation.

INJUNCTIVE RELIEF

47. This panel is presented with two lawsuits, one filed by Governor Cooper, along with a cross-claim filed by the State Board of Elections, and a second filed by NC NAACP. Although the Governor only challenges two of the proposed amendments, in the interest of judicial economy we will analyze the issues presented by all four of the proposed amendments in each lawsuit, as we find the application of the aforementioned legal principles to be substantially different with respect to each of the four proposed amendments and, specifically, the proposed Ballot Question pertaining to each.

48. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is

necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 88, 243 S.E.2d 156, 160 (1978).

The Tax Rate Proposed Amendment

49. S.L. 2018-119, as shown above, proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section. NC NAACP contend that the proposed Ballot Language in S.L. 2018-119 is misleading, suggesting that the currently-applicable tax rate will be reduced. We conclude otherwise. The language of the Ballot Question may not be perfect, but it is virtually identical to the wording of the amendment itself, referring clearly to "... maximum allowable rate." NC NAACP would prefer that the Ballot Question use the term "maximum tax rate cap," but the word "cap" appears nowhere in the amendment itself and we do not consider it necessary for the Ballot Question to explain all potential legal ramifications of the amendment, but only its intended effect.

The Photo Identification for Voting Proposed Amendment

50. S.L. 2018-128, as shown above, proposes an amendment requiring photo identification in order to vote in person. The proposed amendment would amend Article VI, Sections 2 and 3 of the North Carolina Constitution, providing identical language to each section, the pertinent provisions of which read as follows: "Voters offering to vote in person shall

present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." The language of the Ballot Question adopted by the General Assembly reads: "Constitutional Amendment to require voters to provide photo identification before voting in person."

54. NC NAACP contends that the ballot language is misleading by failing to define "photo identification" and failing to make clear that implementing legislation will be needed to establish which photo IDs would suffice. Again, we concur otherwise. There can be little doubt whether or not the voters will be able to identify the issue on which they will be voting with respect to this proposed amendment. This panel takes judicial notice that Voter ID laws currently comprise a significant political issue in this country, on which an overwhelming majority of voters have strong feelings, one way or the other. The General Assembly has the exclusive authority to determine the details of any implementing legislation and it would be entirely inappropriate for this panel to speculate as to whether or not that legislation will comport with state and federal constitutional requirements. We have already noted that there is a presumption of constitutional validity afforded to every act of the General Assembly, and we must afford that same presumption to acts that may be enacted in the future.

In making these foregoing observations, we are mindful of the fact that there has been ongoing litigation in the federal courts concerning similar legislation previously passed by this General Assembly. Indeed, NC NAACP has devoted much of its argument on this amendment to the reasons for their philosophical opposition to the Voter ID amendment itself. These arguments go well beyond the function of this three-judge panel in these cases. In determining facial constitutional challenges, this court should not concern itself with the wisdom

of the legislation, its political ramifications, or the possible motives of the legislators in submitting the issue to voters in the form of a proposed constitutional amendment. This court is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-128, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

The Board Appointments Proposed Amendment

53. S.L. 2018-117, discussed above, proposes to amend Article VI of the North Carolina Constitution by adding a new section and Article I, Section 6 by rewriting the section, amend Article II, Section 20 by rewriting the section, and amend Article III, Section 5 by rewriting the section. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

54. Governor Cooper, the State Board of Elections, and the NC NAACP complain that this ballot language is misleading in saying that the amendment "establishes" a bipartisan Board of Ethics and Elections, and will "prohibit" legislators from serving on boards and commissions exercising executive or judicial authority. While the language may not be the most accurate or articulate description of the effect of these provisions, we do not find that the language in these two parts of the Ballot Question is so misleading, standing alone, so as to violate constitutional requirements; although each of these provisions already exists under law, neither has previously been addressed specifically by our state constitution.

53. In addition to the two points described above, the Ballot Question says only: "to clarify the appointment authority of the Legislative and the Judicial Branches[.]" The Merriam-Webster Dictionary defines "clarify" as "to make understandable" or "to free of confusion." The concern here with this particular language in the Ballot Question is whether it describes the remaining portions of the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that this portion of the ballot language in the Board Appointments Proposed Amendment does not sufficiently inform the voters and is not stated in such manner as to enable them intelligently to express their opinion upon it. In particular:

a. The proposed amendment substantially realigns appointment authority as allocated previously between the Legislative and Executive branches, but makes no mention of how the amendment affects the Executive branch.

b. The ballot language mentions clarification of appointment authority of the Judicial Branch, but the Amendment makes no mention of any changes to appointment authority of the Judiciary.

c. The amendment makes significant changes of the duties of the Governor in exercising power pursuant to the Separation of Powers clause, but no mention is made of that change in the ballot language

The Judicial Vacancies Proposed Amendment

54. S.L. 2018-118, as shown above, proposes to amend Article IV of the North Carolina Constitution by adding a new section, amend Article IV, Section 1 by rewriting the section, amend Article IV, Section 18 by adding a new subsection, repeal in its entirety Article

IV, Section 19, and amend Article II, Section 22, Subsection (5) by rewriting the subsection. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

57. Governor Cooper, the State Board of Elections, and NC NAACP complain that this ballot language is misleading in saying that the amendment implements a "nonpartisan merit based system" that instead relying on "political influence" relies on "professional qualifications". A majority of this panel agrees and holds that the language in this Ballot Question misleads and does not sufficiently inform the voters. The concern here with the Ballot Question, again, is whether it describes the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that the ballot language in S.L. 2018-118 does not sufficiently inform the voters and is not stated in such manner to enable them intelligently to express their opinion upon it. In particular:

a. The ballot language indicates that the nonpartisan merit-based system will rely on "professional qualifications" rather than "political influence." The amendment requires only that the commission screen and evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified, as prescribed by law. Aside from partisan affiliation, there is no limitation or control on political influence; the nominees are categorized only as qualified or not qualified rather than evaluated or ranked in an order of qualification and

the General Assembly is not required to consider any criteria other than choosing nominees found "qualified" by the Commission. (As pointed out by Plaintiffs, current qualifications by law for holding judicial office in this state only require that the person be 21 years of age or more, hold a law license and, in some instances, be a resident of the District.)

b. The Amendment makes substantial changes to appointment powers of the Governor in filling judicial vacancies, but no mention is made of the Governor in the ballot language.

c. Perhaps most significantly, the ballot language makes no mention of the provisions of Section 5 of S.L. 2018-118, which adds two new provisions to Article II, Section 22, Subsection (5) of the North Carolina Constitution

   i. In commending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice in accordance with Section 22 of Article IV of this Constitution,

   ii. Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 22 of Article IV of this Constitution.

Each of these provisions omits the words "and containing no other matter" included in each of the other enumerated exceptions in Section 5, meaning that proposed Bills coupled with judicial appointments would be immune to a veto by the Governor. The ballot language makes no mention of any effect of the Amendment upon veto powers of the Governor.

58. We therefore find that there is a substantial likelihood that Governor Cooper, the State Board of Elections, and NC NAACP will prevail on the merits of these actions with respect to the constitutionality of the Ballot Question language pertaining to the Board Appointments Proposed Amendment and the Judicial Vacancies Proposed Amendment. We do not find that there is a substantial likelihood that NC NAACP will prevail on the merits of this action with respect to the constitutionality of the Ballot Question language pertaining to the Tax Rate Proposed Amendment and the Photo Identification for Voting Proposed Amendment.

59. We find that irreparable harm will result to Governor Cooper, the State Board of Elections, and NC NAACP if the Ballot Language included in S.L. 2018-117 and S.L. 2018-118 is used in placing these respective proposed constitutional amendments on a ballot, in that we conclude beyond a reasonable doubt that such language does not meet the requirements under the North Carolina Constitution for submission of the issues to the will of the people by providing sufficient notice so that the voters may be fully informed of the question to be called upon to decide and in a manner to enable them intelligently to express their opinion upon it.

60. Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regards to S.L. 2018-117 and S.L. 2018-118. The requested injunctive relief is denied in regards to S.L. 2018-119 and S.L. 2018-120. This Court concludes that no security should be required from the Governor and any officer of the State, but that security in the amount of $1,000 should be required of the NC NAACP pursuant to Rule 65 to secure the payment of costs and damages in the event that it is later determined that this relief has been improvidently granted.

61. This three judge panel recognizes the significance and the urgency of the questions presented in this litigation. This panel also is mindful of its responsibility not to

disturb an act of the law-making body unless it clearly and beyond a reasonable doubt runs counter to a constitutional limitation or prohibition. For that reason, this Order is being expedited so that (1) the parties may proceed with requests for appellate review, if any, or (2) the General Assembly may act immediately to correct the problems in the language of the Ballot Questions so that these proposed amendments, properly identified and described, may yet appear on the November 2018 general election ballot. This panel likewise does not seek to retain jurisdiction to "supervise" or otherwise be involved in redrafting of any Ballot Question language. That process rests in the hands of the General Assembly, subject only to constitutional limitations.

62. In view of the fact that counsel for all parties have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed, this three-judge panel hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of each of the parties to this action.

63. The Honorable Jeffrey K. Carpenter dissents from portions of this Order and will file a separate Opinion detailing his positions on each of the issues herein addressed.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Governor Cooper's motion for a preliminary injunction is hereby GRANTED as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 3 of Session Law 2018-117.

b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

2. Cross-claimant State Board of Elections' motion for a preliminary injunction is hereby GRANTED as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

3. Plaintiff NC NAACP's motion for preliminary injunction is hereby GRANTED IN PART AND DENIED IN PART, as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

4. Except as hereinbefore described, all requests for injunctive relief are hereby DENIED.

5. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff Governor Cooper's claims is hereby DENIED.

6. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff NC NAACP's claims hereby DENIED.

7. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff CAC's claims is hereby GRANTED.

8. The Motions to realign[illegible] of the [illegible] Board of Elections [illegible] by remanded to the Wake County Superior Court for determination.

SO ORDERED, this 21st day of August, 2018.

Forrest D. Bridges, Superior Court Judge

Thomas H. Lock, Superior Court Judge

as a majority of this Three Judge Panel

State Board of Elections

Closed Session Board Minutes

September 15, 2020 (3:16 p.m. – 6:02 p.m.)

In attendance via video conference and/or telephone –Katelyn Love, Kelly Tornow, Lindsey Wakely, Candace Marshall and Annette Barefoot – State Board of Elections Legal Staff, Patrick Gannon - Public Information Officer, Swain Wood and Sripriya Narasimhan – NC Department of Justice; Executive Director Bell in addition to all State Board of Elections members. Roll Call: Dr. Anderson, Mr. Carmon, Mr. Black, Mr. Raymond and Chair Circosta - present.

Chair opened closed session with reminder that the attorney client privilege and confidentiality of items discussed here are ours as a group and not individual. Reminder to preserve the confidentiality of closed sessions and all issues discussed.

Chair stated that closed session minutes from August 31, 2020 would be approved with a minor correction of the opening statement to include language regarding attorney client privilege and confidentiality of items discussed. This revised language would apply to all future closed sessions.

Chair expressed his concern with 49 days before the elections and felt with certainty that the Board of Elections was under assault with lawsuits this election. The agency legal staff and NCDOJ staff were managing the case load. He reached out to NCDOJ to discuss potential settlement opportunities with the State Board members.

Swain Wood, General Counsel to the Attorney General and Sripriya Narasimhan, Deputy General Counsel were introduced. Mr. Wood stated that the Attorney General was the lawyer for the State and DOJ attorneys represent our agency. A memo prepared by AG's office on the election litigation was provided to the Board. The goal of the AG's office was to protect the board in election administration. Multiple lawsuits – 20 or more are currently in ongoing litigation. Eight of those cases are identified for discussion today which deal with voting mechanics and the impact of the pandemic on elections.

Mr. Wood provided a brief summary of the case involving the US Postal Service. Goal is to make sure that the postal service does not slow down delivery of absentee ballots. Noted the NCSBE is not a party to that case, but relevant to some of the issues discussed at this meeting. There will be a hearing next week on this case.

Mr. Wood then moved into a discussion of pending NCSBE cases. Noted that some groups are coordinating, and others are not. Noted that most are constitutional challenges under both NC and US constitution. Cases have been very active with depositions and hearings. It is expected that all cases will have a hearing and subsequent ruling between now and Election Day. Some cases will continue after Election Day. Some will go up for appeal and others will not continue further. With court rulings, one or more judges could change what the State Board will do in upcoming elections. There is a high potential for conflicting rulings and changing rules.

Mr. Wood then moved to a discussion of the settlement possibility. Noted that we would need to find some common ground with plaintiffs and that any settlement would be subject to judicial approval. Allows professional staff to be in control of the rules going forward. He explained that he will walk

through the opportunities for compromise and leverage. Will ultimately ask the Board to authorize the Executive Director to settle these cases along the lines discussed in this meeting.

Chair thanked Mr. Wood for the memo detailing the litigation and noted that he agrees with the AG counsel's litigation assessment. There were areas where there was no interest in compromise – early voting, pre-paid postage, accommodations for the visually impaired, and restrictions on systems for requesting and returning absentee ballots. He asked if any other members wanted to open up these topics for discussion. Noted that there was silence from the other members.

Secretary Anderson commented that focus should be on the issues like extension of receipt deadline as more than one case seeks to do that. She said that she does not want to see the agency accomplish these things by emergency orders. Would prefer to do it in the context of a settlement of specific complaints. Noted that more than one of the cases involves existing legal receipt deadline.

Chair asked the AG's office to begin with this topic. Mr. Wood agreed that there were one or more cases where the issue arose of the postal service warning of delays in delivery. The postal service said it takes as much as a week between when a piece of mail is sent out and when received back. He noted, by law, North Carolina only permits three days between postmark deadline and receipt. A ballot mailed on Election Day that arrives on the 4th day is not counted. For overseas voters under federal law ballots are accepted if they are received by the day before canvass. It is recommend to extend to correlate with overseas deadline – a reasonable deadline for settlement, possibly 9 to 10 days after Election Day.

Mr. Raymond says he cannot support extending civilian absentee deadline. It would compromise the integrity of elections. The current deadline is sufficient. Opens the door for any bad actors that would want to play games, to accomplish that. Stated that he really cannot support this. He understands the need for things to go smoothly, however, believes this recommendation compromises the outcome of the election.

Chair asked Ms. Narasimhan to explain in greater detail the proposed settlement position. He noted that he would like a vote for each individual issue he is asking to settle. That the Executive Director would work specifically within the parameters. There was not a formal vote, but Mr. Raymond indicated his support for this approach.

Mr. Carmon stated that he was under the impression that settlements worked together. Wanted to know if it was still beneficial to settle one instead of all. He noted that any proposed settlement still needs a plaintiff to agree to it. He asked Ms. Narasimhan to explain what may work or not work for an issue by issue approach.

Mr. Wood noted that they came up with the recommended list because they believe it's a set of issues that if presented as a package could get sufficient buy-in from the plaintiffs and the courts for a global resolution. The DOJ will work with whatever settlement options the State Board gives, but the more you give us on these issues to work with, the higher likelihood of accomplishing resolution. Not everything is necessary, but it is a package and plaintiffs will approach it that way.

Ms. Narasimhan summarizes the claims regarding the absentee ballot deadline. Noted that plaintiffs would like all ballots to be counted that are received by the UOCAVA deadline. She thinks there are good reasons the postmark issue is important to the state board. She noted that in offering the position,

the plaintiffs will have to compromise on the postmark position (which would remain unchanged). This is in line with the recommendation from the US Postal Service.

Chair agrees with Mr. Raymond as he does not want any funny business after Election Day. But the postal service has issues now that are a challenge for elections. And a ballot cast on Election Day would have to be returned by the voter by the deadline, not a month later. The voter would have to mail it by Election Day or before. The envelope would have to have some indicia that it was put in the delivery stream on or before Election Day.

Mr. Carmon asked for clarification on voting on settlement positions individually. If there is a sweet package, we have a deal, if there is no sweet package, they may proceed to litigation. Chair suggested the State Board be briefed on all, then vote. Mr. Carmon agreed with this approach. So did Mr. Raymond.

Mr. Black said he thought it would serve better if the State Board could discuss and come to a reasonable decision on each instead of a package. Secretary Anderson noted that she can see both sides with one-by-one vs package approach. She asked for starting with the extension of the receipt deadline as helping in other ways. Noted that it's hard to separate. What we do in one area may help or hinder in others.

Chair stated that the focus should be, is the board willing to settle and will settlement provide a stronger litigation position. Chair asked if they could take a straw poll without taking votes regarding the proposed settlement.

Mr. Black stated that everyone should have a chance to vote, no later than the date for postmarking of ballots. He would agree to the extension of the date for receipt of the ballot but not allowing the postmark on ballots to be after the election. Otherwise, he agrees with board members.

Chair asked if Mr. Raymond's earlier reservations stand. Mr. Raymond stated that his reservations stand. A ballot must be postmarked by Election Day. Chair agreed, but noted his concern that without the settlement a judge may feel differently.

General Counsel Love asked for clarification regarding postmark. Noted postmark only means stamp on the envelope. Noted there is benefit in discussing if this is the only method, or if there are others acceptable to the State Board. Chair noted that they need to know that the ballot was voted on November 3rd and not after. Bottom line is we have to know it was voted by then.

Ms. Narasimhan stated that while the USPS should postmark all mail, however, in practice it does not. Mail could arrive on November 8th with no postmark.

General Counsel Love agreed that this is the part there is a question about. Could BallotTrax be used? She noted the use of UPS and FedEx. There is no postmark, but it is possible for tracking information to show if delivered to the carrier by Election Day.

Chair noted he would be loath to settle anything that would allow ballots to be counted that were voted after Election Day.

Secretary Anderson asked if the agency could make the determination to use Ballottrax if no USPS postmark? She asked if necessary, to the settlement, versus allowing the agency to issue this position/guidance.

General Counsel Love stated that it would be better to put it in settlement vs. State Board interpretation to provide legal certainty. Mr. Wood agreed.

Chair suggested moving on to the next topic.

Mr. Carmon asked if the State Board was clear on language for that portion of the settlement (as it relates to postmark).

Chair invited additional thoughts, but noted his inclination to make a motion that offers Executive Director Brinson Bell the authority to settle outstanding claims as it relates to returned ballots. That they must be received by the State Board of Elections by UOCAVA deadline, if there is sufficient indicia of the ballot being out of the voters hands on Election Day or before.

Chair suggested that Ms. Narasimhan move onto the signature verification requirement. Ms. Narasimhan noted it was included as a claim the plaintiffs are raising, but a numbered memo is satisfactory to resolve this.

Chair asked Ms. Narasimhan to move onto the witness requirement.

Ms. Narasimhan stated that the witness requirement is a subject of litigation in practically all of the lawsuits. Challenge is to the entire one witness requirement to absentee voters in this election. And there is a challenge for individuals living alone, because of COVID-19. There is a concern regarding the current cure provision for a witness deficiency. Plaintiffs have filed legal challenges and received court rulings in other states lifting witness requirement. Guidance was provided to the counties with cure provisions which have now been challenged. Currently there is no cure provision in place, as agency legal staff provided guidance to the counties to refrain from contacting voters about deficient ballots until further notice.

There are two hearings this week before Judge Bryan Collins whom litigation counsel advised was likely sympathetic to the Plaintiff's viewpoint on witnesses. Plaintiffs are seeking to lift the entire requirement. AG proposes we do not lift the requirement. General Assembly was asked to change it and it did not. Instead the AG proposes a cure procedure that is more voter friendly. Cure would confirm that voter is who they say they are when they are filling out the absentee ballot. Would need to discuss form. Cure procedure at present isn't a cure, but a redo. Courts in other states have looked for an alternative pathway.

Ms. Narasimhan noted the need to understand the purpose of the cure provision. There may be ways to do this other than a redo. Need for a pathway.

Associate General Counsel Tornow sought clarification as to whether the initial cure memo issued to the counties and discussed with DOJ attorneys was shared with opposing counsel and the federal court in *Democracy NC*.

Ms. Narasimhan stated that the proposed cure was not given to the court as SBE is adjusting the cure procedures. She stated that it was not filed with the court because there were challenges made to it as soon as it was put out. And a new lawsuit was filed, so cure procedure was not presented to the court.

Chair stated that the witness requirement is important to the Board. The Board does not want to lose the one witness requirement. Problems can exist with missing signatures and address information and how to go about curing the problems. There is danger to the process if we do not figure out some cure.

Ms. Narasimhan stated that DOJ managed to uphold the witness requirement in Federal court in *Democracy NC* case and in state court in the *Chambers* case. In South Carolina, the District Court lifted the witness requirement and no appeal has been filed yet. The impact is that South Carolina is in the 4th Circuit.

Secretary Anderson noted that DOJ memo says we do not have a court-approved cure process and no ballots may be rejected at this time. She noted the first absentee meeting starts September 29. What does this mean for those meetings? Will we have one by the time these boards are situated and ready to act, or will there be an opportunity for the county boards to have a pool of ballots and some deficiency and an opportunity to get them cured even if not in place by the 29th?

Executive Director Bell noted that continuing to update the cure memo is a challenge. Noted we have already accepted nearly 52,000 absentee ballots. From an administrative standpoint, if there is an easier way to resolve the witness situation, that will make it easier for the counties to administer.

Secretary Anderson noted that we should think about the difference in having a witnesses' signature but no name or address and not having a witness signature. If we say that the voter can cure no witness signature, we are exempting them from the witness requirement. This is problematic.

Chair stated that the point of the witness signature is to confirm that the voter voted the ballot. Noted that if cure process confirms it's the voter's ballot, confirmation is still occurring.

Executive Director Bell stated that right now the redesign of the envelope helped with readability and clarity, but voters are confused by the witness signature portion of the envelope. Currently there are 18 different questions about deficiencies, and over 1000 incomplete witness certifications. What is being proposed is the voter will attest that no one nefariously completed the ballot envelope. Upon receipt of a ballot with no witness, the affidavit would be sufficient.

General Counsel Love stated she wanted it to be clear to the board that effective Friday, no cure affidavits or new ballots will be sent out. This is because staff had been preparing to make some changes to the cure memo because of an issue with the envelope design. We were alerted that some voters were confused because the voter and witness signatures are highlighted in light yellow but the rest of the box the witness completes, where they print their name and address, was in grey. So some voters did not complete the grey part, only the yellow signatures. The cure memo was being updated so it would allow the voter to cure a missing witness name and address by providing that information by affidavit if they knew it. Counties were told on Friday that the new memo would be out by the end of the day on Friday. However, the board meeting was scheduled so it did not go out.

Secretary Anderson asked if the counties had started the cure process as originally outlined.

General Counsel Love confirmed that the numbered memo was issued after the *Democracy NC* decision on September 4th. Counties followed that memo until Friday. No new action on ballots by CBE and no ballots have been officially disapproved by any county board of elections.

Chair stated that if we don't get it right it does not matter. Cure must be quick.

Mr. Wood commented that a cure was needed very quickly and could happen by the court in a matter of days.

Chair then directed the discussion to in-person voting and stated that he envisions the cure process as akin to in-person voting. We are not getting rid of the witness requirement.

Mr. Wood noted the early data about ballots being rejected is concerning. Disparate impact across demographic and racial groups.

Associate General Counsel Tornow noted that with the advent of BallotTrax, voters are now seeing that there may be an issue with their ballot and they are contacting the county boards. This is an additional administrative concern because presently the county board is not able to tell them whether or not they can cure their ballot so they are confused. Chair pointed out it's better to pause now than to pause later.

A discussion was had regarding CBE checking signature on voter registration record with that as a cure when the signatures are compared. Secretary Anderson asked how does the voter verify that it's actually their ballot during the cure process? Do they sign to that effect? How will the county board confirm the signature?

Chair noted that he did not envision a signature comparison. If the county board staff are not comfortable, don't cure and instead spoil the ballot. Mr. Black restated his opinion that we should not do away with the witness law. It is an important thing to retain. If struck down, then ballots without it and resulting in more lawsuits. Refers to 9th district hearing and need to keep. Okay if the staff member calls the voter (preferred) or emails the voters then okay. Getting away from the witness aspect may result in additional consequences. Be careful in trying to keep hijinks from going on. We want to give the voter a sense of security and have them feel good about the voting process.

Chair stated that we could do nothing regarding these issues or we could reach agreement on settlement options. There is the possibility that the court could impose more sanctions on us. We want to maintain elections security and have the litigation go away.

Mr. Carmon wanted to know what are we offering as a way that the voter may cure a witness deficiency? We agree not to remove witness requirements.

Chair summarized his motion as permitting the voter to cure deficiencies with the witness requirement.

Executive Director Bell agreed in not removing the witness requirement. She restated her support for a cure process whereby the voter attests to their ballot. Cure will allow for the voter to attest, even if no witness info, or if no witness, that it is their ballot.

Mr. Carmon inquired as to how to handle a possible attestation – mailed to voter, emailed to voter, provide to voter in person. Would we send a new ballot?

Executive Director Bell said it would be a form. Received by mail or email or in person.

Mr. Wood stated that from a litigation perspective, the AG is concerned about something fair, administrable and efficient. Serves the primary thrust of the purpose of the rule. Mr. Raymond stated that we must keep the witness requirement. Voter showing up in person as a cure would be great. One thing to consider is that the Plaintiffs as a group would not agree to a requirement that the voter appear in person to cure any deficiency.

Chair stated that all board members agree on retaining witness requirement. With the options of email, in person and mail, worried about adverse rulings in court.

Secretary Anderson commented on the burden on voters. Letting the voter know of a deficiency and a potential to do over, as we get closer to Election Day, a do over would become more problematic for the voter without an extension of the time for allowed receipt of the new ballot. Again, a lack of witness signature places a burden on the voter.

Chair stated that today the burden on the voter is not bad but at the end closer to Election Day it would be worse. Chair asked Secretary Anderson what specifically she is concerned about with respect to the proposed cure process.

Secretary Anderson indicated her concern that cure affidavit or memo could be exploited by the same person who sent the ballot. No more assurance then we did from the get-go. Said she was trying to balance vote with criticism and challenges that we might get as an agency – that we will get criticism.

Chair said he thinks it's unlikely the same nefarious actor could act twice. Secretary Anderson asked if this would protect us from protests and voter challenges.

Ms. Narasimhan responded that a judge would have ordered it, so it protects the State Board from collateral attack.

Chair moved the discussion to the next topic, in person return of absentee ballots. Voters are seeking ways to return their ballot without using the USPS. Per the existing rule from 2018, is there no way to streamline the process. The idea is not to abandon logging of voter ballots as they come into the elections office. The potential problem is with the chain of custody of the log and the impact of how to make the process work best in a COVID-19 environment with the passing of pens back and forth by voter and clerk. Ideally, the voter would enter the CBE office with a ballot. The clerk would get the voter's name and CIV#, ask if the person was the voter, near relative or guardian or other. Then the ballot would be received if voter or near relative or guardian. There is a question of how to handle if the response from the individual is that they are neither voter or near relative or guardian. The individual would be attesting to a crime.

Secretary Anderson stated that we are dealing with the existing law and existing rule. Raised question about how far we should deviate from rule. What happens when a ballot is accepted by an ineligible person dropping it off? What do we do with those logged as dropped off by "other?" Not returned correctly.

General Counsel Love explained the history of the rule. Stated that return by an unauthorized person is a felony, not that the ballot is not counted. An absentee ballot is not invalid if delivered by someone not

authorized. She distinguished this from the absentee request form statute, which says explicitly that a request form returned by an unauthorized person invalidates the request.

Mr. Black proposed the idea of a poster/sign being evident at the CBE office that would notify the person dropping off the ballot that it was a felony to bring the ballot into the office if they were not either the voter or a near relative or guardian of the voter. They would be directed to take the ballot back to the voter. The signs would educate the voters and at the same time caution at the same time against committing a felony.

Chair stated that simplest method is best. The onus should be placed on the CBE clerk to take down the information, name, CIV#, relationship to voter, and then receive the ballot. Signage would be good to educate the voter.

Mr. Wood stated that there is a litigation risk as the rule was not written with consideration of a pandemic. Judges are sympathetic about contact issues and procedures in place. Plaintiffs in cases want a drop box which could in turn result in ballot harvesting.

Chair says he is opposed to unmanned drop boxes.

Secretary Anderson proposed the CBE clerk obtain the name, relationship to voter, and marking the ballot as accepted. The voter will assume that whether dropped in a box or handed to clerk, ballot as being accepted. She noted that marking relationship to voter as "other" but still giving the ballot to the clerk would give the appearance that it's being accepted and counted.

Chair said he originally thought not asking the question of relationship to voter would best prevent contest, but we probably need to ask the question.

General Counsel Love provided an explanation of the law such that the CBE would let the SBE investigations team know if a ballot were returned by an unauthorized person. Specifics of the case would be considered to determine whether it was a priority according to the Investigations Policy; specifically, whether it was intentional, willful and attempted to influence the election.

Chair suggested that the log is something that should be handled by the clerk, not by the voter. CIV number and name are written down by the clerk. Confirm whether person returning ballot is voter, near relative, or "other."

Executive Director Bell clarified that if someone other than the voter or near relative drops off the ballot, the clerk would collect additional information. She provided further history and guidance on this issue from an administrative viewpoint. When a ballot is mailed, there is no way to determine who dropped it in the postal box. In prior elections, absentee voting was at 3 to 4 percent of voters, maybe as high as 5 percent. In today's environment of the pandemic, the number is closer to 30 to 40 percent of absentee voters. We have to consider if the person is trying to be a good neighbor without knowing their action is a felony. Items are turned over to investigations with the fear of others getting their hands on the logs. She believes that it is a best practice to have the CBE clerk collect the information and post notices as described by Mr. Black. Before the rule, no log was required. An example shared was that in past few days in Henderson County over 700 voters have showed up in person to turn in their absentee ballots. The lobbies of some county board offices are only the size of doctors or dentist offices. In these small spaces we're seeing as many people drop off in a day as we might see in a one-

stop site or an Election Day polling place. I issued the emergency order to reduce long lines and reduce long lines, and the current written log requirement counters that.

Discussion between board members and Executive Director on how to handle if an unauthorized person attempts to drop off the ballot. It is agreed that log is important but discussed who within the CBE office should handle. Temporary staff may not be able to handle issues with someone who is not authorized returning a ballot.

Mr. Carmon stated he does not want our county board staff to turn a blind eye to someone breaking the law. Mr. Black felt that the CBE clerk should handle the processing of ballot, review for errors, cure some errors immediately for a walk-in voter. Discussion ensued regarding the clerk being reluctant to take the ballot if it was returned by an unauthorized person. Secretary Anderson commented that a good Samaritan neighbor returning the ballot for a voter should not be punished nor should that ballot be rejected as a result.

General Counsel Love provided guidance that the numbered memo and administrative rule clarify that a ballot that is returned by an unauthorized person is not invalid. The county board of elections would consider who delivered the ballot in conjunction with other evidence in determining whether the ballot envelope was properly executed. General Counsel Love also clarified that statute states that once the county board of elections accepts the ballot, it cannot be returned to the voter, even if the ballot is being returned by an unauthorized person.

Executive Director suggested that the agency could provide more guidance in the updated numbered memo for various scenarios – for example, the same person delivers 20 ballots to the CBE office. This would be a red flag for potential ballot harvesting.

Chair made the motion that the SBE propose to empower the executive director to authorize settlement on any, and all outstanding cases in which the Attorney General's Office proposes settlement that achieves the following:

> 1. As it pertains to late return of ballots, that ballots will be accepted if they have a postmark or other indicia of receipt of November 3rd (BallotTrax, commercial carrier tracking info, etc.) They need to come back by UOCAVA deadline – close of business on the day before county canvass.
>
> 2. Witness and assistant requirement – must remain in effect and in full force and that the voter herself has the opportunity to cure any deficiencies in voter's attestation or witness portions of container-return envelope. The assistant deficiencies may also be cured.
>
> 3. No unmanned ballot drop boxes allowed. Maintain log – clerk asks for name of person returning ballot, and verbal acknowledgement of relationship to voter that they are voter or near relative. Then the clerk writes down CIV number on the log. Then if person returning is not near relative or voter, clerk will take down name, address, relationship to voter, and then we will accept receipt of the ballot and keep that info available for any investigation.

Discussion on the motion to delegate authority to Executive Director. Specifically, the date for acceptance of late return ballots.

Mr. Raymond stated November 3rd for civilian voters and UOCAVA voters had 9 days. Chair agreed with November 3rd postmark and allowing 9 days for receipt. Mr. Black expressed his concern about relying

on canvass, which might be changed by a court. He did not want the date automatically extended. He expressed his preference for relying on a date certain. All board members would accept November 3rd postmark and allowing 9 days after for receipt of ballot. Mr. Black expressed his preference for a date certain. Chair noted that the idea is to cure postal deficiencies, so he's okay with a date certain. Executive Director Bell suggested the alternative of 9 calendar days after the election. Both Chair and Mr. Black acknowledged support of this.

Chair noted that delegation of settlement authority to Executive Director is not blanket, but only within parameters of this motion. This information is confidential.

Second of motion by Member Carmon. Roll Call vote: Anderson – aye, Black – aye, Carmon – aye, Raymond – aye, Chair – aye.

Chair, General Counsel Love and Executive Director Bell discussed language for the motion in open session. Announcement will be taken in open session about delegation of authority. Chair stated that the State Board of Elections was in a good place. There are no good options since March 3rd and COVID-19 impact. He asked that the Attorney General's office keep us updated on litigation and settlement efforts.

The Chair made the motion that the State Board return to open session. The motion was seconded by Secretary Anderson. Closed session ended at 6:02 p.m.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2020 SEP 22 A 11:10

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, in his official capacity as 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.

No. 20-CVS-8881

PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Defendants Damon Circosta and the North Carolina State Board of Elections ("Executive Defendants"), by and through counsel, respectfully move this Court pursuant to Local Rule 3.4 for entry of a Consent Judgment, filed concurrently with this Joint Motion. In support thereof, Parties show the Court as follows:

1. On August 18, 2020, Plaintiffs filed an Amended Complaint, seeking declaratory and injunctive relief to enjoin North Carolina laws related to in-person and absentee-by-mail voting in the remaining elections in 2020 that they alleged unconstitutionally burden the right to vote in light of the current public health crisis caused by the novel coronavirus ("COVID-19").

2. Also on August 18, Plaintiffs filed a Motion for Preliminary Injunction seeking to:

(i) enjoin the enforcement of the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the 2020 elections, and order Defendants to count all otherwise eligible ballots that are postmarked by Election Day and received by county boards of elections up to nine days after Election Day;

(ii) enjoin the enforcement of the witness requirements for absentee ballots set forth in N.C. Gen. Stat. § 163-231(a), as applied to voters residing in single-person or single-adult households;

(iii) enjoin the enforcement of N.C. Gen. Stat. § 163-231(b)(1) to the extent that it requires voters to pay for postage in order to mail their absentee ballots;

(iv) order Defendants to provide postage for absentee ballots submitted by mail in the November election;

(v) order Defendants to provide uniform guidance and training for election officials engaging in signature verification and instruct county election officials not to reject absentee ballots due to perceived non-matching signatures until the county officials receive such guidance and undergo training;

(vi) enjoin the enforcement of N.C. Gen. Stat. §§ 163-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; and

(vii) enjoin the enforcement of N.C. Gen. Stat. § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering Defendants to allow county election officials to expand early voting by up to an additional 21 days for the November election.

Plaintiffs filed a brief in support of their Motion on September 4, 2020.

3. Since Plaintiffs moved the Court for preliminary injunctive relief, Plaintiffs and Executive Defendants have engaged in substantial good-faith negotiations regarding a potential settlement of Plaintiffs' claims against Executive Defendants.

4. Following extensive negotiation, the Parties have reached a settlement to fully resolve Plaintiffs' claims, the terms of which are set forth in the proposed Consent Judgment filed concurrently with this Joint Motion.

5. As set forth in the Consent Judgment and in the exhibits thereto, (Numbered Memos 2020-19, 2020-22, and 2020-23), all ballots postmarked by Election Day shall be counted if otherwise eligible and received up to nine days after Election Day, pursuant to Numbered Memo 2020-22. Numbered Memo 2020-19 implements a procedure to cure certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses. Finally, Numbered Memo 2020-23 instructs county boards to designate separate absentee ballot drop-off stations at all one-stop early voting locations and county board offices, through which voters and authorized persons may return absentee ballots in person.

6. Plaintiffs and Executive Defendants further agree to each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Defendants, and all such claims Plaintiffs allege against the Executive Defendants in this action related to the conduct of the 2020 elections shall be dismissed.

WHEREFORE Plaintiffs and Executive Defendants respectfully request that this Court grant their Joint Motion and enter the proposed Consent Judgment, filed concurrently with this motion, as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections.

Dated: September 22, 2020

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document by email to counsel for defendants, addressed as follows:

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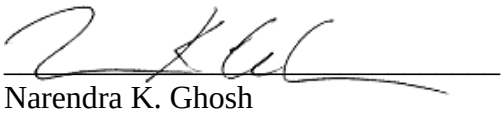
This the 22nd day of September, 2020.



Narendra K. Ghosh

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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, in his official capacity as 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.

No. 20-CVS-8881

STIPULATION AND CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Executive Defendants Damon Circosta and the North Carolina State Board of Elections (collectively, "the Consent Parties") stipulate to the following and request that this Court approve this Consent Judgment. This Stipulation and Consent Judgment encompasses Plaintiffs' claims, which pertain to elections in 2020 ("2020 elections") and are premised upon the current public health crisis facing North Carolina caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on August 10, 2020, Plaintiffs filed a complaint, and, on August 18, 2020, Plaintiffs filed an amended complaint against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections, of: (1) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b); (2) its requirement that all absentee ballot envelopes must be signed by a witness during the pandemic, as applied to voters in single-person or single-adult households, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) its failure to provide pre-paid postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, as applied to voters who submit ballots through the United States Postal Service, *id*. § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C. Gen. Stat. § 163-226.3(a)(5) (the "Ballot Delivery Ban") (collectively, the "Challenged Provisions");

WHEREAS the Complaint seeks to enjoin enforcement of the Challenged Provisions during the 2020 elections due to the ongoing public health crisis caused by the spread of the novel coronavirus (COVID-19);

WHEREAS the COVID-19 public health crisis is ongoing, and North Carolina remains under Executive Order 163, which contemplates a phased reopening of North Carolina but strongly recommends social distancing, Exec. Order 163, § 2.2, mandates mask wearing in most business and government settings, *id.* § 3.2, imposes capacity limits in most public-facing business and government settings, *id.*, § 3.2(e), prohibits mass gatherings, *id.* § 7, and states that "[p]eople who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes," *id.* § 2.1;

WHEREAS North Carolina remains under a state of emergency, declared by the Governor, "based on the public health emergency posed by COVID-19," Exec. Order 116, and under a federal disaster declaration statewide, 85 Fed. Reg. 20701;

WHEREAS as of September 19, 2020, North Carolina has had more than 192,248 confirmed COVID-19 cases, with more than 3,235 fatalities;

WHEREAS COVID-19 case counts continue to grow across the country, and the director of the Center for Disease Control and Prevention recently warned that the country should brace for "the worst fall from a public health perspective, we've ever had"[1];

WHEREAS the Executive Director of the North Carolina State Board of Elections observed that COVID-19 infections in North Carolina are likely to continue into the fall, through at least Election Day;[2]

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[1] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

WHEREAS, on June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[3] The CDC guidance encourages elections officials to:

• "Encourage voters to stay at least 6 feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained;

• Increase the number of polling locations available for early voting and extend hours of operation at early voting sites;

• Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance;

• Minimize lines as much as possible, especially in small, indoor spaces;

• "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility";

• Offer alternatives to in-person voting;

• Offer alternative voting options that minimize exposure between poll workers and voters;

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[2] N.C. State Bd. of Elections, *Emergency Order, Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency* (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf.

[3] *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

WHEREAS large crowds at early voting and long lines on Election Day may create public health risks and impose severe burdens on the right to vote, making absentee voting by mail essential to ameliorate these possibilities;

WHEREAS, as of September 18, 2020, more than 889,273 absentee ballots had already been requested by North Carolina voters, more than 14 times the number of absentee ballots that had been requested by this time in 2016;

WHEREAS the absentee voting period for the 2020 elections began on September 4, 2020, N.C. Gen. Stat. § 163-227.10(a), and, as of September 21, 2020, nearly 1,400 absentee ballots had been flagged for incomplete witness information, according to data from the State Board of Elections[4];

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.*

WHEREAS courts in other states have enjoined those states from enforcing witness and notarization requirements, some of which are similar to North Carolina's Challenged Provisions,

[4] *North Carolina Early Voting Statistics*, U.S. Elections Project, https://electproject.github.io/Early-Vote-2020G/NC.html.

for elections occurring this year during the COVID-19 pandemic. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment suspending "notary or two-witness requirement" for mail ballots and finding that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" single-witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become 'both too restrictive and not restrictive enough to effectively prevent voter fraud.'"); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election);

WHEREAS the delivery standards for the Postal Service, even in ordinary times, contemplate at a minimum at least a week for ballots to be processed through the postal system and delivered to election officials[5];

WHEREAS the General Counsel of the Postal Service sent a letter on July 30, 2020 to North Carolina's Secretary of State warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[6] In particular, the Postal Service recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.*;

WHEREAS mail delivery conditions are already leading to greater delays: since mid-July there have been sharp decreases in the percentage of U.S. Postal Service mail, sent by any method, delivered on time;[7]

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[5] *State and Local Election Mail—User's Guide*, U.S. Postal Serv. (Jan. 2020), https://about.usps.com/publications/pub632.pdf.

[6] Letter to North Carolina Secretary of State from USPS General Counsel, App'x to Compl., ECF No. 1-1 at 53-55, *Commonwealth of Pennsylvania v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

[7] *Service Performance Measurement PMG Briefing*, U.S. Postal Serv. (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

WHEREAS on August 21, 2020, the State of North Carolina, along with six other states filed a lawsuit challenging the Postal Service's procedural changes that the State alleges will likely delay election mail even further, creating a "significant risk" that North Carolina voters will be disenfranchised by the State's relevant deadlines governing absentee ballots;

WHEREAS increases in absentee voting, coupled with mail delays, threaten to slow down the process of mailing and returning absentee ballots, and appear likely to impact the 2020 elections;

WHEREAS pursuant to N.C. Gen. Stat. § 163-231(b)(2)(c), North Carolina already accepts military and overseas absentee ballots until the end of business on the business day before the canvass which occurs no earlier than the tenth day after the election, *see id.* § 163-182.5(b);

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also extended Election Day Receipt Deadlines in light of the current public health crisis. *See Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (extending ballot receipt deadline for November 2020 election); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (extending ballot receipt deadline for the November 2020 election); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR (N.D. Ga, Aug. 31, 2020) (granting motion for preliminary injunction in part and extending receipt deadline); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt

deadline and recognizing that enforcing the deadline was likely to disenfranchise thousands of voters); *LaRose v. Simon*, No. 62-CV-20-3149 at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's receipt deadline);

WHEREAS multiple courts have found that the enforcement of various other state election laws during the pandemic violate constitutional rights. *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App'x 170, 173 (6th Cir. 2020) (finding ballot-access provisions unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *Garbett v. Herbert*, No. 2:20-CV-245-RJS, 2020 WL 2064101, at *18 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witness requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3490216 (D. Idaho June 26, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560 (2020);

WHEREAS the State Board of Elections has broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c).

WHEREAS the Executive Director of the State Board, as the chief State elections official, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19;

WHEREAS the Consent Parties agree that an expeditious resolution of this matter for the 2020 elections, in the manner contemplated by the terms of this Stipulation and Consent Judgment, will limit confusion and increase certainty surrounding the 2020 elections and is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest;

WHEREAS the Executive Defendants believe that continued litigation over the Challenged Provisions will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina;

WHEREAS the Consent Parties wish to avoid uncertainty about the requirements and obligations of voting in the 2020 elections for State Board officials and non-parties including county board officials, staff, and election workers, and the voting public;

WHEREAS the Consent Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and the Consent Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, other courts across the country have approved similar consent judgments between parties, *see Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4460914 (D.R.I. July 30, 2020) (approving consent judgment to not enforce Witness Requirement in primary and November general elections); Stipulation and Partial Consent

Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election); *League of Women Voters of Va.*, 2020 WL 2158249 (approving consent judgment to not enforce Witness Requirement in primary election); *see also Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (denying motion to stay the consent judgment and judgment pending appeal) *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

WHEREAS the Executive Defendants do not waive any protections offered to them through federal or state law and do not make any representations regarding the merits of Plaintiffs' claims or potential defenses which could be raised in litigation;

WHEREAS the Consent Parties agree that the Consent Judgment promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs' claims regarding the 2020 elections against the Executive Branch Defendants;

WHEREAS Plaintiffs agree to a waiver to any entitlement to damages and fees, including attorneys' fees, expenses, and costs against the Executive Defendants with respect to any and all claims raised by Plaintiffs in this action relating to the 2020 elections;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Consent Parties, that: (i) the terms of this Consent Judgment constitute a fair and equitable settlement of the issues raised with respect to the 2020 elections, and (ii) the Consent Judgment is intended to and does resolve Plaintiffs' claims;

NOW, THEREFORE, upon consent of the Consent Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Consent Judgment, including relinquishment of certain legal rights, the Consent Parties agree as follows:

II.
JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Article 26 of Chapter 1 of the General Statutes, N.C. Gen. Stat. § 7A-245(a)(2), and N.C. Gen. Stat. § 1-493, and has jurisdiction over the Consent Parties herein. Venue for this action is proper in Wake County Superior Court because the Executive Defendants reside in Wake County. *Id.* § 1-82. The Court shall retain jurisdiction of this Stipulation and Consent Judgment for the duration of the term of this Stipulation and Consent Judgment for purposes of entering all orders and judgments that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Consent Judgment applies to and is binding upon the following parties:

A. Damon Circosta, in his capacity as Chair of the North Carolina State Board of Elections;

B. The North Carolina State Board of Elections; and

C. All Plaintiffs.

IV.
SCOPE OF CONSENT JUDGMENT

A. This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Consent Judgment, they are releasing any claims under the North Carolina Constitution that they might have against Executive Defendants with respect to the Challenged Provisions in the 2020 elections. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Consent Judgment.

B. The Consent Parties to this Stipulation and Consent Judgment acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Challenged Provisions for elections held after the 2020 elections.

C. The Consent Parties to this Stipulation and Consent Judgment further acknowledge that by signing this Stipulation and Consent Judgment, the Consent Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Consent Judgment, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Consent Judgment or defenses thereto.

D. By entering this Stipulation and Consent Judgment, Plaintiffs are fully settling a disputed matter between themselves and Executive Defendants. The Consent Parties are entering this Stipulation and Consent Judgment for the purpose of resolving disputed claims, avoiding the burdens and costs associated with the costs of litigating this matter through final judgment, and ensuring both safety and certainty in advance of the 2020 elections. Nothing in this Stipulation and Consent Judgment constitutes an admission by any party of liability or wrongdoing. The Consent Parties acknowledge that a court may seek to consider this Stipulation and Consent

Judgment, including the violations alleged in Plaintiffs' Amended Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT JUDGMENT OBJECTIVES

In addition to settling the claims of the Consent Parties, the objective of this Stipulation and Consent Judgment is to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

VI.
INJUNCTIVE RELIEF

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND JUDGED FOR THE REASONS STATED ABOVE THAT:

A. For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots, as set forth in N.C. Gen. Stat. § 163-231(b)(2), to the deadline set forth in paragraph VI.B below and in Numbered Memo 2020-22 (attached as Exhibit A).

B. Pursuant to Numbered Memo 2020-22, an absentee ballot shall be counted as timely in the 2020 elections 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. For purposes of this Stipulation and Consent Judgment and as the Numbered Memo requires, a ballot shall be considered postmarked on or before Election Day if it has a postmark affixed to it or if there is information in the Postal Service tracking system (BallotTrax), or another tracking service

offered by the Postal Service or the commercial carrier, indicating that the ballot was in the custody of the Postal Service or a commercial carrier on or before Election Day.

C. For the 2020 elections, Executive Defendants shall institute a process to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19 (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature. If a county board office receives a container-return envelope with such a curable deficiency, it shall contact the voter in writing by mail and, if available, email, within one business day of identifying the deficiency, informing the voter that there is an issue with their absentee ballot and enclosing a cure certification. The written notice shall be sent to the address to which the voter requested their ballot be sent. 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.

D. Pursuant to Numbered Memo 2020-23, (attached as Exhibit C) Executive Defendants shall institute a process for establishing a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices. Such drop-off stations may be located outdoors subject to the conditions set forth in Numbered Memo 2020-23. In addition, when a person returns a ballot in person, the county board intake staffer shall 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 returning the ballot in person indicates that they are not

the voter or the voter's near relative or legal guardian, the county board intake staffer will also require the person to provide their address and phone number.

E. Executive Defendants shall take additional reasonable steps to inform the public of the contents of Numbered Memos 2020-19, -22, -23 and shall encourage all county boards of elections to do the same.

F. Plaintiffs will withdraw their Motion for Preliminary Injunction, filed on August 18, 2020, and will not file any further motions for relief for the 2020 elections based on the claims raised in their Amended Complaint of August 18, 2020.

G. In accordance with the terms of this Stipulation and Consent Judgment, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to this lawsuit.

H. All remaining claims filed by Plaintiffs against the Executive Defendants related to the conduct of the 2020 elections in this action are hereby dismissed with prejudice. The Court will retain jurisdiction of these claims only as to enforcement of the Stipulation and Consent Judgment.

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The parties to this Stipulation and Consent Judgment may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Consent Judgment that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Consent Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Consent Judgment, or for granting any other relief not inconsistent with the terms of this Consent Judgment, until this Consent Judgment is terminated. The Consent Parties may apply to this Court for any orders or

other relief necessary to construe or effectuate this Stipulation and Consent Judgment or seek informal conferences for direction as may be appropriate. The Consent Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If any Party believes that another has not complied with the requirements of this Stipulation and Consent Judgment, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Consent Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Consent Judgment that requires any Party to file a motion with this Court for enforcement of this Stipulation and Consent Judgment.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Consent Parties acknowledge that no person has exerted undue pressure on them to enter into this Stipulation and Consent Judgment. Every Party is voluntarily choosing to enter into this Stipulation and Consent Judgment because of the benefits that are provided under the agreement. The Consent Parties acknowledge that they have read and understand the terms of this Stipulation and Consent Judgment; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Consent Judgment to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Consent Judgment shall be severable, and, should any provisions be declared by a court of competent jurisdiction to be

unenforceable, the remaining provisions of this Stipulation and Consent Judgment shall remain in full force and effect.

C. Agreement. This Stipulation and Consent Judgment is binding. The Consent Parties acknowledge that they have been advised that (i) no other Party has a duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Consent Judgment may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Consent Judgment if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Judgment constitutes the entire agreement between the Consent Parties relating to the constitutionality and enforcement of the Challenged Provisions as they pertain to the 2020 elections. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Consent Judgment are valid unless they are in writing, identified as an amendment to this Stipulation and Consent Judgment, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Consent Judgment except as herein explicitly contained.

E. Warranty. The persons signing this Stipulation and Consent Judgment warrant that they have full authority to enter this Stipulation and Consent Judgment on behalf of the Party each represents, and that this Stipulation and Consent Judgment is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Consent Judgment may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Consent Judgment is effective upon the date it is entered by the Court.

IX.
TERMINATION

This Stipulation and Consent Judgment shall remain in effect through the certification of ballots for the 2020 elections. The Court shall retain jurisdiction to enforce the terms of the Consent Judgment for the duration of this Consent Judgment. This Court's jurisdiction over this Stipulation and Consent Judgment shall automatically terminate after the certification of all ballots for the 2020 elections.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND CONSENT JUDGMENT AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT JUDGMENT TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA CHAIR, NORTH CAROLINA STATE BOARD OF ELECTIONS

Dated: September 22, 2020

By: /s/ Alexander McC. Peters
Alexander McC. Peters, N.C. Bar No. 13654
Terrance Steed
North Carolina Dept. of Justice
Post Office Box 629
Raleigh, N.C. 27602
apeters@ncdoj.gov
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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ

Dated: September 22, 2020

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Molly Mitchell
PERKINS COIE LLP

IT IS SO ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT JUDGMENT.

Dated: _____ _____

Superior Court Judge

EXHIBIT A

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

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.

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[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.

EXHIBIT B

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

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

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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 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.

COUNTY LETTERHEAD

DATE

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE

RE: Notice of a Problem with Your Absentee Ballot

The [County] Board of Elections received your returned absentee ballot. We were unable to approve the counting of your absentee ballot for the following reason or reasons:

- ☐ The absentee return envelope arrived at the county board of elections office unsealed.
- ☐ The absentee return envelope did not contain a ballot or contained the ballots of more than one voter.
- ☐ Other:
  _____

We have reissued a new absentee ballot. Please pay careful attention to ALL of the instructions on the back of the container-return envelope and complete and return your ballot so that your vote may be counted.

If time permits and you decide not to vote this reissued absentee ballot, you may vote in person at an early voting site in the county during the one-stop early voting period (October 15-31), or at the polling place of your proper precinct on Election Day, **November 3**. The hours for voting on Election Day are from **6:30 a.m.** to **7:30 p.m.** To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov.

Sincerely,

[NAME]
_____ County Board of Elections

COUNTY LETTERHEAD

DATE

VOTER'S NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
CIV Number

Absentee Cure Certification

There is a problem with your absentee ballot – please sign and return this form.

Instructions
You are receiving this affidavit because your absentee ballot envelope is missing information. For your absentee ballot to be counted, complete and return this affidavit as soon as possible. **The affidavit must be received by your county board of elections by no later than 5 p.m. on Thursday, November 12, 2020.** You, your near relative or legal guardian, or a multipartisan assistance team (MAT), can return the affidavit by:

- Email (add county email address if not in letterhead) (you can email a picture of the form)
- Fax (add county fax number if not in letterhead)
- Delivering it in person to the county board of elections office
- Mail or commercial carrier (add county mailing address)

If this affidavit is not returned to the county board of elections by the deadline, your absentee ballot will not count. If you decide not to return this affidavit, you may still vote in person during the early voting period (October 15-October 31) or on Election Day, November 3, 2020. To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov .

READ AND COMPLETE 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.

(Print name and sign below)

_____

Voter's Printed Name **(Required)**

_____

Voter's Signature* **(Required)**

* 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 in cursive or italics such as is commonly seen with a program such as DocuSign.

EXHIBIT C

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

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.

September 23, 2020

Everyone,

Effectively immediately, I hereby submit my resignation to the North Carolina State Board of Elections.

It has been a great honor for me to serve the people of North Carolina on the board, however I cannot, in good conscious, continue for the following reasons:

Regarding the settlement agreement with the plaintiffs in the lawsuit filed by the North Carolina Alliance for Retired Americans against the State Board of Elections, attorneys from AG Josh Stein's office did not advise us of the fact that a lot of the concessions made in the settlement have already been denied in a prior case by a federal judge and another case by a state court three-judge panel.

Secondly, we were led to believe that refusal to make a deal that included the extension of mail-in absentee ballots, past the legal acceptance date, would also result in the elimination of the one-witness requirement for residents voting absentee by mail.

Additionally, we were led to believe the effective administration of the election itself rested upon a settlement. And if a judicial order were issued as voters cast their ballots, the effective administration of the election would be impossible.

To preserve the trust of the voters, I acted to keep the one-witness requirement and mitigate the possibility the election being disrupted by a judicial order by compromising on the acceptance date of absentee ballots.

It is impossible to have true bipartisanship when both sides of the political aisle do not have the important and vital information needed to make the right decisions.

Sincerely,

Ken Raymond

North Carolina State Board of Elections
PO Box 27255
Raleigh, NC 27611-7255

September 23, 2020

To: Chairman Damon Circosta

Dear Mr. Chairman,

I am submitting my resignation to the State Board of Elections effective immediately. However, I would like to clarify some of the issues that came before this board and the reason for my decision.

In particular, the recent memo outlining the new absentee ballot "cure" for the witness requirement. It was not my understanding that the cure would simply mean an affidavit, or cure document, would be sent to the voter for a confirmation that this ballot was their own. No further information but a signature by the voter affirming the ballot was theirs would be required. My understanding was the witness requirement would stay as it is currently with the exception that only one witness signature would be required. Not only was I taken aback by this but I am sure many county directors will be too.

Many of the new rules for the elections this year have been brought about by lawsuits filed against the NCBOE and the opinion from the NC Attorney General's Office that the likelihood of prevailing in court would be slim. A negotiated settlement would be the best option for our agency to pursue. Part of this thinking was that if we waited for a 3-panel judge to rule, that the ruling might occur during the voting period and would cause disruption to the process. Even if that didn't happen, my thought was that a ruling might be more detrimental than what could be negotiated.

I also disagreed vehemently with the one-stop requirement equation to determine the number of one-stop sites. My argument was that it would lead to higher costs to the county by forcing them to open additional sites and not relying on the county boards to use their knowledge of their own county voters in determining how many sites they felt were needed. While waivers were offered by the NCSBOE to the counties, it was in my view, over-reach by the agency.

It was also misleading by the agency to send out a memo requiring the weekend hours at one-stop sites requiring a minimum of 10 hours for the one-stop sites to be open. My take on the initial communication sent to county BOE's was that implied that Sunday voting be included. This was amplified by requiring counties that had already submitted plans to re-submit them based on the new requirements. My protestation to the agency was met with the response that they would be sending out a memo giving examples for the counties to use that would not included Sunday voting. While that was done by the agency, in later meetings where non-unanimous county one-site stop sites were mediated by our Board, it was stated by at least one county that they thought that Sunday voting would be required. I myself received two phone calls from local board members from separate county boards asking if Sunday voting was now required.

These are all items I discussed with our Director and offered my opinion.

In my time on the board we have:

1) Undertaken the 9th Congressional hearing on the first full day I was appointed to the board
2) Fired Kim Strach, which I voted against
3) Hired Karen Brinson Bell, which I voted against. Note: While I voted against hiring Director Brinson Bell, I want to commend her for re-organizing the office to operate more efficiently and improving communication with the county BOE offices, which was goal of mine.
4) Certified new voting equipment which at least allowed more than one vendor to compete. Hopefully, in the future, by opening competition between vendors will result in better systems at a competitive price.
5) Dealt with our usual hurricane preparedness but threw in a earthquake for good measure.
6) Lost one chairman (Chairman Cordle) and gained another (Chairman Cirosta).
7) Currently dealing with COVID-19, an unprecedented pandemic that has forced us all to look at how elections will be conducted for now.

I can only offer that I did my best to act to reach consensus to make sensible decisions while knowing that the vote most likely would end up 3-2. These recent decisions have made it untenable for me to remain as member.

Sincerely,

David Black

Bench Memo
Tuesday, September 15, 2020
3 p.m. meeting

This will be a remote meeting using Cisco Webex. For the **open session**, you should have received an invitation with access for the meeting. You will need to have a microphone on your computer to participate. You can also join using the following link: https://ncgov.webex.com/ncgov/onstage/g.php?MTID=ed32d939d1696fb9345eed16a5363b108.

For the **closed session**, you should have received a second Cisco Webex invitation. When it is time for the closed session, fully close out of the open session and then log into the closed session. You can also access the meeting using the following link: https://ncgov.webex.com/ncgov/j.php?MTID=m7d2d355882525d07dfc63caf5af160fe

Meeting number: 171 884 6487
Password: g3DGu3735cm

Please contact Katelyn (864-357-3335) if there are any issues.

A copy of the meeting notice and tentative agenda, as well as a link to the documents, is available here.

Statement Regarding Ethics and Conflict of Interest

Authority

G.S. § 138A-15(e)

(e) At the beginning of any meeting of a board, the chair shall remind all members of their duty to avoid conflicts of interest under this

Subchapter. The chair also shall inquire as to whether there is any known conflict of interest with respect to any matters coming before the board at that time.

Counsel Note

Counsel has not been informed of any conflict in advance of this meeting.

Suggested Statement {Chair}

In accordance with the State Government Ethics Act, it is the duty of every Board member to avoid both conflicts of interest and the appearance of a conflict.

Does any Board member have any known conflict of interest or any appearance of a conflict with respect to any matters coming before the Board today? If so, please identify the conflict or appearance of conflict and refrain from any undue participation in the particular matter.

Approval of Prior Meeting Minutes

Materials

August 31, 2020 Open Session Meeting Minutes (draft)

August 31, 2020 Closed Session Meeting Minutes (attached to email)

Authority

G.S. § 143-318.10(e) (relevant portion)

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. …

Draft Motion

I move that we approve the State Board's open and closed session meeting minutes of August 31, 2020.

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Appointment to Vacancies on County Boards of Elections

Materials

Applications are available upon request (Bertie applications attached to email)

Authority

G.S. § 163-30(d) (relevant portion)

Whenever a vacancy occurs in the membership of a county board of elections for any cause the State chair of the political party of the vacating member shall have the right to recommend two registered voters of the affected county for such office, and it shall be the duty of the State Board to fill the vacancy from the names thus recommended.

Summary

We have received nominations from the Democratic Party as follows:

- McDowell County
    1. Michelle Wilson Price (Class 3 misdemeanor 20 years ago; no conflict indicated)
    2. Harriet Allen Rockett (no conflict indicated)
- Nash County
    1. Brenda Johnson Foster (no conflict indicated)
    2. Dr. Cassandra Stroud Conover (no conflict indicated)

We have received nominations from the Republican Party as follows:

- Person County
    1. David Harris Minshall (no conflict indicated)

2. Grace Anne Mattson (no conflict indicated)

Suggested Motion

I move that the State Board appoint _____ to the _____ County Board of Elections

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Closed Session

Authority

§ 143-318.11. Closed sessions.

(a) Permitted Purposes. - It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

…

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its

minutes as soon as possible within a reasonable time after the settlement is concluded.

…

(c) Calling a Closed Session. - A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

Counsel Note

As background for the closed session, there are 8 cases to be discussed in relation to possible settlement:

- Democracy North Carolina v. State Board of Elections
    1. A federal district court judge entered a preliminary injunction that requires a cure process for deficient absentee ballots and that allows one named plaintiff to receive help from a nursing home employee. The judge denied all of plaintiff's other requests
    2. Plaintiffs and the State Board have asked the judge to reconsider denial of the injunction to allow nursing home employees to assist voters due to the visitation restrictions subsequently issued by DHHS.
    3. This was the only lawsuit where plaintiffs sought to allow contactless drop boxes for in person return of absentee ballots. The judge denied this request.
- Chambers v. North Carolina
    1. A three-judge panel of the Wake County Superior Court unanimously denied the preliminary injunction motion, thereby declining to enjoin the witness requirement.
- Taliaferro v. State Board of Elections
    1. This case is pending in federal district court in the Eastern District of North Carolina. It challenges the failure to

provide a way for blind voters to vote absentee by mail independently, without depending on another person for assistance. In its brief, the State Board largely did not dispute plaintiffs' claim that the agency has failed to comply with the ADA and Rehabilitation Act requirements, due to applicable caselaw in the 4th Circuit. However, we do not believe it would not be administratively feasible to implement an accessible option safely for the November election due cyber security issues with online voting, changes to SEIMS, and implementing a new software program.

Marc Elias cases:

- North Carolina Alliance for Retired Americans v. State Board of Elections
    1. Raises challenges to the single witness requirement for single-person or single-adult households, the postage requirement, signature matching procedures, and the prohibitions on who can assist with and deliver an absentee request form.
    2. **A hearing on the preliminary injunction (PI) hearing is scheduled at 9:30 a.m. on September 18 before a single judge.**
- Stringer v. State Board of Elections
    1. The complaint raises various constitutional challenges to absentee voting requirements.
    2. There is a hearing scheduled on September 18 but it is not expected to include the PI motion on this case, because there is no dispute the case should go to a three-judge panel.
- North Carolina Democratic Party v. State Board of Elections
    1. This case was filed in 2019 and challenges various early voting restrictions. Awaiting appointment of a three-judge panel.
- Advance North Carolina v. State Board of Elections
    1. Challenges restrictions made by Session Law 2019-239 on who can make an absentee ballot request.
- Democratic Senatorial Campaign Committee v. State Board

1. This case was filed last week and challenges the requirement in Numbered Memo 2020-19 that a voter be issued a new ballot if the witness did not provide their name, address, or signature. The memo was issued to implement the injunction in the Democracy NC case.

The Department of Justice has recommended several areas for settlement in litigation against the State Board. In addition to their memo, board members may wish to consider the following information:

Absentee Ballot Return Deadline

- State law requires that ballots be postmarked after Election Day. This requirement is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, we are aware that the USPS does not postmark all ballots. Ballottrax now provides county boards and voters with status updates to track ballots in the mail stream. If a ballot was not postmarked, this information could be researched in Ballottrax to determine if there was affirmative information indicating that the ballot was mailed by Election Day.
- The Post Office continues to state that ballots may take up to a week to be delivered, but state law only allows ballots to be accepted that are received three days after the election.
- If the Executive Director's emergency powers are used to extend the receipt deadline for ballots, an emergency order requires consideration of the factors in the rule, which must be calculated to offset the nature and scope of the disruption, and consultation with the board. It also requires that there be a disruption to the election normal schedule for an election to trigger any use of emergency powers. 08 NCAC 01 .0106. At this time, the executive director would need to consider whether there enough information to determine the nature and scope of a potential disruption with mail service and to determine how long the deadline needed to be extended for. More specific information may be available closer to the mail deadline for absentee ballots. For more discussion on the emergency powers authority, see the section "In Person Return of Absentee Ballots" below. If this change were made as part of a

settlement agreement that was approved by the court, it would help protect the action from legal attack.

In Person Return of Absentee Ballots

- Voters may return their absentee ballots in person to either the county board of elections office or a one-stop site. They may not return them to an Election Day polling place.
- There has been a vast increase in the number of voters who are returning their absentee ballots in person. Approximately half of absentee ballots returned in the first week of voting were returned in person. Using a written log adds several minutes to the time that a voter must spend returning their ballot in person. Some county boards are providing drop off locations outside but for others this is not feasible.
- It is a Class I felony for any person other than the voter or their near relative or legal guardian take possession of a ballot for delivery to a voter or for return to a county board of elections. G.S. § 163-226.3(a)(5).
- In 2018, the State Board adopted a rule that requires logging of absentee ballots that are returned in person to the county board of elections office. 08 NCAC 18 .0102. The rule requires that the person delivery the ballot 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 de-livery 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. According to the rule and State Board guidance, 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.
    - The rule was adopted in part because of the illegal absentee ballot activity that took place in Bladen County in 2016. Previously, policy required that county boards log absentee ballots that were received in person, but not every county complied with this and the logs varied somewhat in what

was required. The logs that Bladen County used in 2018 were important to the CD9 investigation.
    - Keeping a detailed log may allow a county board to determine if there are patterns with absentee ballots being returned in person. It also creates a record of who dropped off the ballot in case there is a need to contact that person and the voter cannot be reached or does not know the contact information for that person. Relaxing or eliminating the written log could lead the public or candidates to question whether large numbers of ballots were returned illegally and could result in the filing of post-election litigation and election protests, ultimately calling into question the results of the election. Further, the written log is one of the security measures the State Board has cited to for why absentee voting is secure.
- By its language, the rule requiring a written log does not apply to one-stop sites, likely because voters rarely used this option in prior elections. The rule was previously interpreted as requiring that all absentee ballots be logged when they were returned in person, regardless of the location of return. It could be confusing to voters and county board staff and difficult to justify requiring logging at a one-stop site but not at a county board office, especially if the county board office is also a one-stop site.
- Absent a settlement agreement or court order, requiring only verbal confirmation at a county board office would require an emergency order because it is too late to change the rule before the election due to the extended amount of time that rulemaking takes. Any time the executive director exercises her emergency powers due to a pandemic-related issue, there is a risk of legal challenges, because the Rules Review Commission disapproved the temporary rule that would have clarified that it included a disease epidemic. Some groups, including the NCGOP, have laid out legal arguments that the RRC's disapproval means that the emergency powers cannot be used for a disruption related to the pandemic. While counsel believe that the permanent rule's language is sufficient, the usage of emergency powers must be weighed against possible litigation risk, or risk that the

legislature might act to repeal or further limit the statutory authorization for the executive director's emergency powers.

- There is one lawsuit, Democracy NC, that sought to allow contactless drop boxes for voters to return their absentee ballots. However, the judge denied this request. Therefore, it is unclear how or why the State Board would settle a claim about drop boxes when the judge already denied the claim, and this is not at issue in any other active lawsuit discussed in this memo. In the absence of a court order, the executive director would need to exercise emergency powers to lift the written log requirement at county board offices.

Witness Requirement

- Following the federal court order in *Democracy NC*, Numbered Memo 2020-19 was issued on August 21. It states that a missing voter signature or a voter signature in the wrong place on the absentee return envelope can be corrected by the voter signing a cure affidavit. The memo further provides that missing witness information (name, address, signature) cannot be cured and if a ballot is missing this information the county board will spoil the ballot and issue the voter a new ballot.
- Once absentee ballots started being returned, county boards provided feedback that some voters were confused by the highlighting on the witness section. The section the witness is to complete is grey, but the witness signature box is light yellow, so some witnesses only signed but did not provide their name and address. In response, State Board staff began considering whether witness name and address could be provided by the voter in a cure affidavit, if the voter knows that information. The law requires that this information be provided but does not prohibit the voter from providing it. However, for ballots missing the witness signature, voters would still be reissued a new ballot, since the voter cannot sign and attest for the witness. State Board staff also considered allowing the voter to cure the missing witness signature by affidavit by having the witness and voter sign the affidavit; however, this places additional burden on the voter because the same witness who observed the voter marking their ballot may no longer be available or the voter may no longer

have access to that person. Issuing the voter a new ballot in the case of a missing witness signature would give the voter the opportunity to have a different person witness the reissued ballot.

- Last Friday, staff sent county boards of elections an email instructing them not to send voters any cure affidavits or to spoil any ballots and reissue a new ballot. County boards were told that the Numbered Memo 2020-19 was being updated and would be reissued with updated cure letters by the end of the day. Because of the board meeting scheduled for Tuesday, the numbered memo update could not be finalized and therefore county boards are not currently following up with voters whose ballots have missing information.
- Numbered Memo 2020-19 states that a county board shall not use signature verification to compare the voter's signature on the absentee envelope with the signature on file for the voter. It explains: "Verification of the voter's identity is completed through the witness requirement."
- If the witness requirement is allowed to be cured by the voter submitting an affidavit, consider whether the voter would be allowed to submit the affidavit simultaneously with the ballot. And if so, consider how to know that the voter is the person who voted the absentee ballot or who filled out the cure affidavit. 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.

Other Considerations

Because of the pandemic, the absentee process is under much more scrutiny this year than it has been previously. Political parties, advocacy groups, candidates, and the public are closely monitoring how these processes are carried out and how county boards ensure that all voters can safely cast their votes in a fair and accurate election. And the pandemic has led to a number of lawsuits, which have caused uncertainty for voters and from an election administration standpoint.

When considering a settlement agreement, the board may wish to consider what the court might order to determine whether settlement is

more advantageous. Consider what specifically a court might order, when it might be ordered, and whether settling now is more favorable, in light of all factors. Settlement would provide certainty sooner than waiting for a court order and would give the State Board more control over what changes were made. The board may also want to consider if the settlement terms are acceptable and whether it is preferable to decide now or to await the courts. Additionally, the board may wish to consider the effect of settlement of several of these issues simultaneously; for example, if there any compounding effects to the absentee process if a voter is allowed to cure a missing witness signature and the log requirement is also relaxed. Also, the legislature is a party to a number of the cases discussed in this memo and that they may oppose settlement. The courts have approved settlement without the legislature's consent in past cases against other state entities, so this may not be a barrier.

Finally, one other matter to note is the constitutional and statutory provisions that give the General Assembly—not the courts—the authority to determine the outcome of a contested election for Council of State offices. See Article VI, § 5 of the NC Constitution. Pursuant to G.S. § 163-182.13A, "contest" means "a challenge to the apparent election for any elective office established by Article III of the Constitution [Council of State offices] or to request the decision of an undecided election to any elective office established by Article III of the Constitution…" A decision of the General Assembly in determining the contest of the election is not reviewable by state courts. Legal questions about how to count out-of-precinct provisional ballots led to the General Assembly to decide the outcome of the Superintendent of Public Instruction after the 2004 election. See this article by Bob Joyce for additional description of the dispute. When the governor's race was close in 2016, it was thought that the General Assembly might take jurisdiction over it, but that did not happen.

Suggested Motion

I move that the State Board go into closed session pursuant to G.S. § 143-318.11(a)(3) to receive legal advice from its attorneys in the following cases:

- *North Carolina Democratic Party v. State Board of Elections*
- *Advance North Carolina v. State Board of Elections*
- *Chambers v. North Carolina*
- *Stringer v. State Board of Elections*
- *North Carolina Alliance for Retired Americans v. State Board of Elections*
- *Democracy North Carolina v. State Board of Elections*
- *Taliaferro v. State Board of Elections*
- *Democratic Senatorial Campaign Committee v. State Board*

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Delegation of Settlement Authority to the Executive Director

Authority

§ 163-26. Executive Director of State Board of Elections.

There is hereby created the position of Executive Director of the State Board, who shall perform all duties imposed by statute and such duties as may be assigned by the State Board.

Suggested Motion

I move that the State Board delegate settlement authority to its Executive Director for the following cases: [List cases]

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Adjournment

Suggested Motion

I move that the State Board adjourn.

Roll Call

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

MEMORANDUM

From: North Carolina Department of Justice

To: Members of the North Carolina State Board of Elections

RE: COVID-19-Related Litigation

The State Board and its members are parties to a multitude of constitutional challenges to state elections law as applied to the November 2020 general election, which will be held in the midst of the COVID-19 health crisis. These include multiple cases in both federal and state courts.

This memo assesses the principal requests for relief sought by the plaintiffs in these cases, and identifies areas of concern, as well as potential resolution.

The requests for relief generally fall into the following categories:

(1) relaxation of absentee ballot signature verification procedures,

(2) lifting the witness requirement for absentee ballots,

(3) prepaid postage,

(4) extension of the civilian absentee-ballot receipt deadline,

(5) removal of restrictions on assistance with requesting absentee ballots,

(6) removal of restrictions on assistance with returning absentee ballots,

(7) extending early voting,

(8) providing electronic ballots for visually impaired voters,

(9) cure procedures for witness signature requirement on absentee ballots and

(10) implementation of contactless absentee ballot return procedures.

Litigation on these issues remains pending in numerous state and federal courts in North Carolina. To date, some preliminary rulings have been issued, and while most claims have been denied, some have been granted. For example, the Department of Justice recently defended the Board and its members against challenges to the application of the witness requirement, lack of prepaid postage, restrictions on assistance with absentee-ballot request forms, and restrictions on assistance with returning absentee ballots. *See Democracy North Carolina v. State Board of Elections*, No. 20-cv-457 Dkt. 134 (M.D.N.C. 2020) (denying motion for preliminary injunction on challenges to multiple requirements, while granting motion as to the availability of a cure process for absentee ballots and allowing nursing home employees to assist a named plaintiff in marking, witnessing, and returning his absentee ballot); *Chambers v. North Carolina*, No. 20

CVS 500124 (Wake Cty. Sup. Ct. 2020), Order on Injunctive Relief (denying motion for preliminary injunction on challenge to the application of the witness requirement).

In one case (*Taliaferro v. North Carolina State Bd. of Elections* (E.D.N.C.)), the law compelled us to concede that the Board's current processes do not comply with the Americans with Disabilities Act and that the plaintiffs are likely to succeed in the case. This determination was based on a 2016 case from the United States Court of Appeals for the Fourth Circuit, *National Federation of the Blind v. Lamone*, which held that Maryland's failure to provide any means by which a blind voter could vote absentee without assistance resulted in a clear denial of meaningful access to the absentee voting program. 813 F.3d 494, 506-07 (4th Cir. 2016). We are not aware of any measures taken by the State Board to comply with this ruling since it was issued in 2016. It is our understanding that Board staff believes it is now too late to implement effective and secure measures to comply with this ruling for the 2020 election. However, compliance for future elections should be among the Board's highest priorities.

On many of the issues outlined above, the risk of adverse and unpredictable rulings remains.

Similar claims have been brought in other states, with many courts ruling in favor of the challengers.

- *See, e.g., Arizona Democratic Party v. Hobbs*, No. 2:20-cv-1143 (D. Ariz) (granting motion for preliminary and permanent injunction challenging the state's failure to afford voters an opportunity to cure the omission of a signature from an otherwise-valid mail-in ballot); *Democratic Nat'l Committee v. Hobbs*, No. 18-15845 (9th Cir. 2020) (striking down statute that criminalizes assistance with absentee-ballot delivery); *Vote Latino v. Hobbs*, No. 2:19-cv-05685 (D. Ariz.) (settlement of challenge to absentee ballot receipt deadline); *New Georgia Project v. Raffensperger*, No. 1:20-cv-1986 (N.D. Ga.) (granting preliminary injunction to challenge of absentee ballot receipt deadline); *Frederick v. Lawson*, No. 1:19-cv-1959 (S.D. Ind.) (permanent injunction granted precluding the rejection of "any mail-in absentee ballot on the basis of a signature mismatch absent adequate notice and cure procedures to the affected voter"); *LaRose v. Simon*, No. 62-cv-20-3149 (Minn. Dist. Ct., Ramsey Cty.) (consent decree lifting the witness requirement for November general elections and changing the election day receipt deadline for mail-in ballots); *Western Native Voice v. Stapleton*, No. DV-2020-377 (Mont. Dist. Ct., Yellowstone Cty.) (granting preliminary injunction enjoining enforcement of restrictions on absentee ballot assistance laws); *Frye v. Gardner*, 1:20-cv-751 (D. N.H.) (settlement providing that state will take steps to ensure that blind voters can vote absentee without sacrificing secrecy); *Gallagher v. N.Y. State Bd. of Elections*, No. 1:20-cv-5504 (S.D.N.Y.) (granting preliminary injunction against requirement that ballots be postmarked and postponing absentee ballot receipt deadline); *Hernandez v. N.Y. State Bd. of Elections*, No. 1:20-cv-4003 (S.D.N.Y.) (settling with agreement to provide online absentee balloting capabilities to blind voters); *Self Advocacy Solutions North Dakota v. Jaeger*, No. 3:20-cv-71 (D. N.D.) (permanent injunction granted against state law allowing rejection of ballots with signature mismatch issues without providing opportunity to cure); *Common Cause Rhode Island v. Gorbea*, No. 1:20-cv-318 (D.R.I.)

(consent decree enjoining witness requirement); *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C.) (settling dispute re prepaid postage requirement); *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C.) (enjoining enforcement of the witness requirement); *League of Women Voters v. Hargett*, No. 3:19-cv-385 (M.D. Tenn.) (enjoining state laws that restrict ability of community-based organizations to provide voter registration assistance); *Gary v. Va. Dept. of Elections*, No. 1:20-cv-860 (E.D.Va.) (partial consent judgment on access to electronic voting for blind voters); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-23 (W.D.Va.) (consent decree lifting witness requirement in 2020).

Reasonable settlement of certain claims may heighten the Board's ability to ensure that resulting orders and requirements are practical and administrable.

Because North Carolina has already begun sending out absentee ballots and as we approach Election Day and the early voting period, an adverse ruling may become increasingly difficult to administer. This difficulty may cause confusion for pollworkers, county staff, and voters.

In some cases, courts will conclude that these considerations counsel against granting relief. But it is likely that in other cases, courts may find those considerations are outweighed by the impact of what they conclude is a legal violation.

In addition, as with all litigation, there is a significant possibility that the court grants relief that the parties did not ask for or that is greater and/or more difficult to administer than the relief requested by the parties. *See, e.g., Community Success Initiative v. State Bd. of Elections* (Wake. Cty. Sup. Ct.) (enjoining the State Board from prohibiting those who are serving extended probation sentences for failure to pay fines and fees, where no party requested this relief).

Settlement may lessen exposure to claims for attorneys' fees and costs by prevailing plaintiffs.

In light of these considerations, and the recent wave of court decisions around the country granting challengers relief in the midst of the global pandemic, the Department of Justice recommends that consideration be given to the following potential pathways to resolution of some claims in pending litigation.

Potential Areas for Compromise

Signature verification requirement

- Challenge to requirement that absentee voters must sign the absentee ballot container envelope, arguing that the State Board has failed to provide county boards with sufficient guidance to verify the absentee voter's signature.
- This claim is a misapprehension of the State's signature verification requirement.

- Settlement offer from plaintiffs: The plaintiffs are willing to settle this claim, in light of the guidance provided by the State Board through Numbered Memo 2020-19, published on August 21, 2020.

Civilian absentee ballot receipt deadline

- Challenge to the civilian absentee ballot receipt deadline of Election Day + 3 days (5 p.m. on Friday, November 6).
- Potential settlement position: Allow for all ballots mailed by Election Day to be counted if received by the day before canvass (same deadline as UOCAVA ballots).
- This would be align with the lawsuit that the State has filed separately against the U.S. Postal Service challenging the new policies causing delays in election mail delivery.
- By extending the deadline, we would be adhering to the U.S. Postal Service's warnings that there should be at least one week from the request deadline to the postmark deadline *and* at least one week from the postmark deadline to the receipt deadline by the county board.
- This would provide the plaintiffs with less than the full scope of relief they seek (lifting the postmark requirement).
- This resolution may be sufficient for the plaintiffs in the remaining challenges to the absentee ballot receipt deadline.

Application of witness requirement

- Challenge to one-witness requirement for absentee voters in November 2020 elections.
- Note: the State Board is already under an injunction not to reject any ballots without an appropriate and court-approved cure process. At this point in time, we do not have a court-approved cure process in place at all—no ballots may be rejected for deficiencies at this time.
    - The State Board staff have developed some cure provisions that have been circulated by Numbered Memo to the counties. But the plaintiffs are still challenging these provisions and this Numbered Memo has now become the subject of further litigation and a new lawsuit.
- The witness requirement is the subject of multiple other lawsuits.
    - Two of these are scheduled for hearings before Judge Bryan Collins on Friday.
- Potential settlement position: Provide cure procedures that are somewhat more voter-friendly (e.g., confirmation from voter that s/he is the one who filled out the absentee ballot).
- This would align with the evidence the State Board has provided in other litigation that the primary purpose of the witness signature requirement is not to verify the voter's identity (which is done through other means), but rather to prevent the voter from having her ballot stolen and marked without her knowledge.
- This offer would provide the plaintiffs with less than the full scope of relief they seek (lifting the witness requirement altogether) and would leave the state law intact.
- In addition, it would address the claim of inadequate cure procedures for incorrect or missing witness signatures on absentee ballots.

- This resolution may be sufficient for the plaintiffs in the remaining challenges to the witness requirement and witness-signature cure procedures.

Lack of contactless absentee ballot return provisions

- Challenge to lack of provisions allowing for contactless absentee ballot return.
- Potential settlement position: Allow for absentee ballots to be dropped off at early voting sites with verbal confirmation instead of formal logging.
- We have been told that a challenge to the lack of contactless drop boxes and the logging procedure may be imminent, potentially as an additional claim in one or more existing cases.
- We believe the above settlement position may be sufficient to avoid the lawsuit.

Other Claims (Compromise Not Recommended at this Time)

Lack of prepaid postage

- Challenge to failure of the State to provide prepaid postage.
- We do not recommend settling this claim, unless the State Board believes that the most recent appropriation by the General Assembly would allow for prepaid postage.
- The only other cases in which the state has provided prepaid postage through litigation have resulted from negotiated settlements.
- Ballots have already gone out in North Carolina—it would be unfair to only provide prepaid postage for those whose ballots have not gone out. Moreover, it would be difficult and confusing to try to send prepaid envelopes out now to those who have already received their ballots.

Restrictions on assistance with requesting and returning absentee ballots

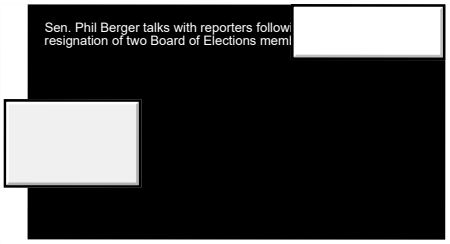
- Challenge to restrictions on assistance with requesting and returning absentee ballots.
- We do not recommend settling these claims at this time.
- In most cases challenging these restrictions in other states, the states have prevailed.
- North Carolina's most recent experience with CD-9 supports the need for some restrictions.

Extending early voting

- Challenge to 17-day early voting period, seeking a period that begins three weeks earlier.
- We do not recommend settling these claims at this time.
- It would be a Herculean administrative burden to procure the leases on early voting sites and sufficient pollworkers at a time when staffing the current early voting period is already difficult.
- Note that it may be sufficient for the plaintiffs if the State Board allowed counties, by unanimous vote or approval by the State Board, to extend the hours of their early voting sites after early voting has commenced, should the crush of voters become difficult for the counties to manage within 8 a.m. and 7:30 p.m. and their weekend early voting hours.

Availability of electronic ballots for the visually impaired

- Challenge to failure to provide electronic absentee ballots to blind voters.
- We do not recommend settling these claims at this time, unless the Board decides that providing this opportunity through existing technology is secure and otherwise appropriate.
- There is a controlling Fourth Circuit decision that identifies this as an ADA violation, and the Board is likely to lose this case on the merits, when ultimately decided. However, we understand the Board staff has determined that correcting this problem for the November 2020 election would create unacceptable logistical and security risks.
- Accordingly, the Department of Justice has filed an opposition to the plaintiffs' motion for a preliminary injunction requiring the State Board to provide electronic absentee voting access to blind voters.
- Until such time as the court rules, there is little opportunity to change course, unless the Board decides that, as a matter of policy, such a change is possible and prudent.



Sen. Phil Berger talks with reporters following the resignation of two Board of Elections members

Sen. Phil Berger at a GOP press conference Friday, Sept. 25, 2020 following the Thursday resignation of two Republican members from the N.C. Board of Elections. BY NC GOP FACEBOOK VIDEO FEED

UP NEXT
Bipartisan duo sing 'Long Black Veil' on the

HOMEPAGE

Republican election officials resigned after call with lawyer for ‘very unhappy’ NCGOP

BY WILL DORAN AND **DANIELLE BATTAGLIA**
SEPTEMBER 25, 2020 08:03 PM , UPDATED 4 MINUTES AGO

Sen. Phil Berger at a GOP press conference Friday, Sept. 25, 2020 following the Thursday resignation of two Republican members from the N.C. Board of Elections.
BY NC GOP FACEBOOK VIDEO FEED

RALEIGH

Both Republican members of the N.C. State Board of Elections voted Tuesday in favor of proposed changes to mail-in voting rules, then resigned in protest of those rules the next day.

Those resignations, of board members Ken Raymond and David Black, came in the wake of several highly critical press releases from the state’s top Republican politicians. A party spokesman confirmed to The News & Observer that they also came after a phone call with the top lawyer for the state Republican Party to convey that the NC GOP was “very unhappy.”

“They called and spoke with our counsel,” said Tim Wigginton, the N.C. Republican Party’s spokesman, referring to Chief Counsel Philip Thomas. “And afterward they put out their resignation letters.”

TOP ARTICLES

On Facebook, Black's wife wrote that his resignation was "not voluntary."

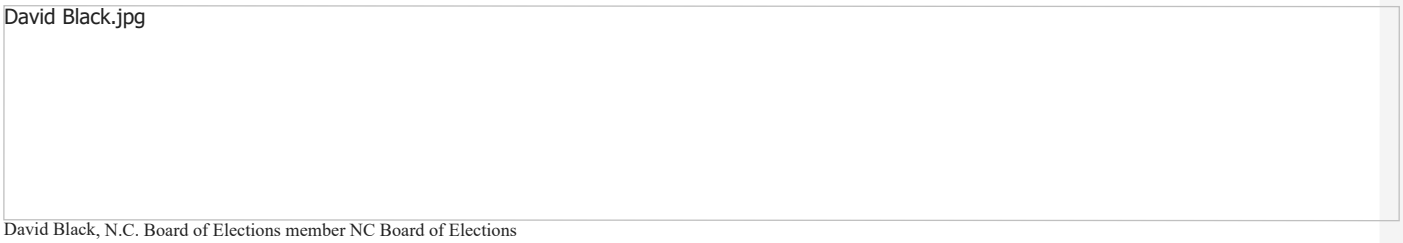
Deb Black's Facebook comment read: "The GOP chairman neglected to mention that these resignations were not voluntary. They were told to resign. Sad times when republicans are firing intelligent and trustworthy republicans."

Wigginton disputed that — but also said there was no mystery about how party leaders felt about Black and Raymond voting with the election board's Democratic members to approve a lawsuit settlement that could lead to new, more relaxed absentee voting rules.

"We can't order anybody to resign," Wigginton said. "But we did have conversations with him that we were very unhappy."

'Politics at its worst'

Efforts to reach Raymond on Friday afternoon weren't successful. David Black confirmed in an interview Friday that his wife did write the Facebook comment. He also spoke about his time, and occasional frustrations, on the board.



David Black, N.C. Board of Elections member NC Board of Elections

Deb Black went on to question the "true agenda" of the Republican Party in her Facebook post. "A fine example of politics at its worst," she wrote.

"She posted them," David Black said. "A lot of what she wrote about is stuff that's on the surface. I think, the best thing to do is to say that she loves me very much, and I love her very much and I appreciate some of the things she writes and sometimes she gets her hackles up."

Black noted his wife also wrote that the couple doesn't always think the same.

"She said we don't exactly share the same political philosophies but it works out OK," Black said. "We agree some but sometimes we just agree not to say anything, but I think she felt it was a good time to put in a few good words for me and I appreciate it."

He said Friday this was not the first time he felt like resigning, but it was the first time he went through with it.

He said his term started with an election-fraud scandal in the 9th Congressional District and included firings and hirings and a new chair for the board.

And to make matters worse, Black said, he would drive more than two hours, from his home in Concord to the state election offices in Raleigh, just to lose on votes.

"It's frustrating when you're on the losing end 3-to-2 every time," Black said, acknowledging he did have some wins and saying he was happy to have served.

Vote by mail settlement

Black and Raymond's resignations came at around 10 p.m. Wednesday, just more than 24 hours after they joined with the Democrats on the board to give unanimous approval to several proposed changes in the rules around voting by mail.

Ken Raymond.jpg

Ken Raymond, N.C. Board of Elections member N.C. Board of Elections

Since then, Democratic politicians have said the changes — which have yet to be formally approved — would address coronavirus concerns and also make it less likely for legitimate voters to have their votes thrown out. But Republicans say the changes could lead to voter fraud.

"It is inviting folks to do things to game an election," Senate leader Phil Berger, a Republican from Rockingham County, said Friday. "And quite frankly if the election's not close, it probably won't make that much difference. But the problem is ... everybody's talking about how close the election for president is going to be in North Carolina, the election for various other offices, for legislative seats."

If a judge approves the lawsuit settlement — which will be up for debate in court Oct. 2 — the new rules would make it easier for voters to fix problems with absentee ballots by signing an affidavit to confirm their identity, instead of having to start over from scratch with a new ballot.

The changes would also extend the number of days after the election that mail-in ballots could arrive and still be counted, and would tweak the rules surrounding the process for people to get a mail-in ballot but then drop it off in person, either at their county elections office or during early voting at a polling place.

In the 2018 elections, an investigation by WRAL and ProPublica found, about 6,000 votes out of 104,000 mail-in ballots were thrown out for various reasons. Black voters were about twice as likely as white voters to have their ballots thrown out.

This year, mail-in voting has been significantly more popular with Democrats than Republicans — but not as much with Black voters, who lean heavily Democratic. As of Thursday, Black voters were 21% of the total registered voters in the state, but just 16% of the 220,000 voters who had already turned in an absentee ballot.

Casting doubt on election

The elections board framed the changes to the rules, specifically on dropping of ballots in person, as a way to further limit contact during the coronavirus pandemic. The proposal also say if someone's ballot is dropped off on their behalf by someone who isn't a close relative, it won't necessarily be thrown out.

But Berger said the rule about only voters or their relatives dropping off absentee ballots was put in place by the General Assembly after the 9th district scandal in 2018 involving suspicions of absentee ballot fraud to benefit the Republican candidate, which led to a congressional election having to be redone.

"That's the thing that I think folks should be most offended by, that what they're doing is eliminating basic protections that actually provide confidence to the people as to the results of the elections," Berger said.

His comments came a day after Republican Sen. Thom Tillis of North Carolina said he was concerned about the absentee voting changes, and two days after Republican President Donald Trump told reporters he wouldn't commit to a peaceful transfer of power if he were to lose the election.

Trump has frequently made evidence-free claims of mail-in voting being rife with fraud. In the same remarks about transition of power, he also said that "I've been complaining very strongly about the ballots, and the ballots are a disaster. We want to get rid of the ballots," the New York Times reported.

Berger on Friday said he's concerned that if North Carolina changes its rules, that might in his opinion cast doubt on the vote count here.

"These are the sorts of things that have the ability of creating uncertainty as to whether or not the result was the right result," he said.

But Democratic Gov. Roy Cooper — who appoints members of the Board of Elections — said on Friday that the proposed changes, in addition to being unanimous, would simply give people assurance that their vote will count.

"Voting is a sacred right, and the state board is working to make it secure and accessible. They are working hard to make sure that people's legal right to vote is protected during this pandemic," Cooper told reporters Friday.

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SEPTEMBER 24, 2020 10:09 PM

ELECTION

Both Republican members of NC Board of Elections resign day after election settlement

SEPTEMBER 23, 2020 10:58 PM

File photo DAVID GOLDMAN *AP*

WILL DORAN

919-836-2858

Will Doran reports on North Carolina politics, with a focus on state employees and agencies. In 2016 he started The News & Observer's fact-checking partnership, PolitiFact NC, and before that he reported on local governments around the Triangle. Contact him at wdoran@newsobserver.com or (919) 836-2858.

DANIELLE BATTAGLIA

919-836-2801

Comments

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ELECTIONS

Previously secret documents revealed on NC mail-in voting settlement opposed by GOP

BY WILL DORAN

SEPTEMBER 25, 2020 10:16 AM , UPDATED 1 HOUR 26 MINUTES AGO

Meeting minutes from elections board's secret lawsuit settlement debate over North Carolina mail-in voting rules are made public to dispute GOP claims.

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UPDATED SEPTEMBER 25, 2020 07:57 AM

NC pastor yells 'white power' during Trump parade

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 8881

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, *et al.*

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*,

Defendants, and

PHILIP E. BERGER in his official capacity as President Pro Tempore of the North Carolina Senate, *et al.*,

Intervenor-Defendants, and

REPUBLICAN NATIONAL COMMITTEE, *et al.*,

Republican Committee-Intervenor Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING OCTOBER 2, 2020 ORDER GRANTING JOINT MOTION FOR ENTRY OF CONSENT JUDGMENT

THIS MATTER CAME ON TO BE HEARD before the Court during the October 2, 2020 Session of the Superior Court of Wake County. All adverse parties received notice and participated. The Court considered the pleadings, arguments, briefs of the parties, supplemental affidavits, and the record established thus far, as well as argument submitted by counsel in attendance.

1. Following the hearing, the Court granted the Joint Motion for Entry of Consent Judgment, whereupon the Consent Judgment was signed by the Court, and filed and served on all parties. The Court sees fit to further explain the basis of its rulings in the Consent Judgment here. The Court heard argument at the October 2, 2020 hearing, considered the arguments made by the

parties, and made a series of oral rulings upon which it based the granting of the Joint Motion and entry of the Consent Judgment. These rulings, which were effective at the time they were announced from the bench, are hereby memorialized and further explained below.

FINDINGS OF FACT

2. This matter involves claims brought by Plaintiffs involving as-applied challenges to the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), enforcement of the witness requirement for absentee ballots set forth in N.C.G.S. § 163-231(a) (as modified by SL 2020-17), the lack of prepaid postage available to absentee-by-mail voters, application of any signature verification requirement, enforcement of elections laws prohibiting individuals and organizations from assisting voters when submitting or filling out absentee ballot request forms or absentee ballots as set forth in N.C.G.S. §§ 163-226.3(a)(5), -230.2(c), (e), and -231(b)(1), and the failure to provide an additional 21 days of early voting.

3. Plaintiff North Carolina Alliance For Retired Americans is incorporated in North Carolina as a 501(c)(4) nonprofit, social welfare organization. The Alliance has over 50,000 members across all 100 of North Carolina's counties. Its members comprise retirees from public and private sector unions, community organizations, and individual activists. Some of its members are disabled, and all of its members are of an age that places them at a heightened risk of complications from coronavirus.

4. Individual Plaintiffs each have their own hardships as well as shared hardships, which encumber their abilities to vote in the election. These include, but are not limited to, significant concerns regarding the United States Postal Service's ability to timely deliver and return absentee ballots; and health concerns related to voting in person, interacting with a witness,

traveling to and from voting sites, or delivering an absentee ballot, particularly for those deemed high risk for COVID-19.

5. On July 30, 2020, Thomas J. Marshall, General Counsel and Executive Vice President of the United States Postal Service sent a letter to North Carolina's Secretary of State, warning her that North Carolina elections law relating to absentee ballot deadlines was "incongruous with the Postal Service's delivery standards." *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D.P.A.), Dkt. 1-1 at 53-55. USPS also stated that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned on time or be counted." *Id.* In particular, USPS recommended that elections officials transmitting communication to voters "allow 1 week for delivery to voters" and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.* Accordingly, in North Carolina, voters can postmark their ballot by Election Day, but because of USPS delays and through no fault of their own, not have their ballots counted because the ballots arrived at the county board of elections office after the statutory deadline.

6. On May 12, 2020, Legislative Defendants noticed their intervention in this case purportedly "as agents of the State" and "on behalf of the General Assembly." LDs' Mot. to Intervene, ¶¶ 9-10.

7. On July 1, 2020, the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, Donald J. Trump for

President, Inc., and the North Carolina Republican Party (the Political Committees) moved to intervene in this case to protect their "specific desire to elect particular candidates," and "the interests of voters throughout North Carolina," as well as their "members' ability to participate in those elections . . . governed by the challenged rules." Political Committees' Mot. to Intervene, ¶¶ 1, 25. The Court granted the Political Committees permissive intervention on September 24, 2020.

8. On August 18, 2020, Plaintiffs filed a motion for preliminary injunction.

9. On September 22, 2020, Plaintiffs and State Defendants jointly moved for the entry of a consent judgment as full and final resolution of Plaintiffs' claims against the State Defendants related to the conduct of the 2020 elections. On October 1, 2020, Plaintiffs withdrew their motion for preliminary injunction.

10. Under the consent order as proposed in the Joint Motion, plaintiffs agreed to forgo many of their demands, including expanded early voting, elimination of the witness requirement for mail-in absentee ballots, elimination of the postmark requirement, and pre-paid postage for mail-in absentee ballot return envelopes. The Executive Defendants agreed: (1) to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine (9) days after Election Day to match the UOCAVA deadline, in keeping with the guidance received on July 30, 2020 from the Postal Service; (2) implement the revised cure process set forth in Numbered Memo 2020-19; and (3) establish separate mail-in absentee ballot "drop off stations" staffed by elections officials at each early voting site and at each county board of elections to reduce the congestion and crowding at early voting sites and county board offices. Plaintiffs agreed to accept

these measures, which fell far short of their demands, "as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections."

11. The consent judgment as proposed does not enjoin any statutes. The proposed consent judgment retains fidelity to the purpose behind these statutes: (1) ensuring that all ballots that are marked in accordance with all state laws are counted so long as the delay in delivery to the county board of elections is no fault of the voter's, (2) ensuring that there is a log of the person who returns absentee ballots so that, in the event of concerns about fraud, these concerns can be investigated, and (3) ensuring that the voter to whom the absentee ballot was issued is the one who voted the ballot that the county board of elections received. In addition, the consent order is narrowly targeted to modifications that address the exigent circumstances of the COVID-19 pandemic. It therefore does not modify any election procedures beyond the 2020 election cycle.

12. As of September 29, 2020, more than 1,116,696 absentee ballots have been requested. As of October 2, 2020, 325,345 have been submitted, and 319,209 have been accepted. Early voting starts on October 15.

13. The Court hereby incorporates by reference those factual statements made in the Stipulation and Consent Judgment, Part I – Recitals, and entered on October 2, 2020 by this Court, as if set forth fully herein.

CONCLUSIONS OF LAW

14. North Carolina courts have a "strong preference for settlement over litigation." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 72, 717 S.E.2d 9, 19 (2011).

15. Although North Carolina courts have not articulated a standard for approval of a consent judgment, courts in this State have looked to the federal standard to provide guidance in

similar contexts. *See, e.g.*, *Ehrenhaus*, 216 N.C. App. at 71-72, 717 S.E.2d at 18-19 (adopting federal standard for approval of class-action settlements). Before approving entry of a consent judgment, a federal court has the duty to "satisfy itself that the agreement is 'fair, adequate and reasonable,' and is 'not illegal, a product of collusion, or against the public interest.'" *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)).

16. On June 10, 2020, the North Carolina General Assembly enacted House Bill 1169, which the Governor signed into law as North Carolina Session Law 2020-17 the following day. This law made a number of changes in response to the COVID-19 pandemic. The legislature did not revise, in any way relevant to the Joint Motion or the Consent Judgment, the emergency powers granted to the State Board or its Executive Director under section 163-27.1 or revise powers granted to the State Board to enter into agreements to avoid protracted litigation under section 163-22.2.

17. Joint movants have demonstrated that the plaintiffs are likely to succeed on the merits of their constitutional claims.

18. The Court finds this agreement is fair, adequate, and reasonable. It is not illegal. It is not a product of collusion. On its face, comparing the complaint to the consent order, the plaintiffs did not obtain all the relief that they had sought. On its face, this is a compromise. There exists no evidence to the contrary.

19. The relief imposed by this consent judgment is very limited. It makes only minor and temporary changes to election procedures to accommodate the exigencies of the COVID-19 pandemic, which also makes it reasonable.

20. The Court finds that there is a strong public interest in having certainty in our elections procedures and rules, and the entry of this consent judgment is, therefore, in the public interest.

21. The North Carolina State Board of Elections has a strong incentive to settle this case to ensure certainty on the procedures that will apply during the current election cycle. Settlement will also provide public confidence in the safety and security in this election, in light of all the serious public-health challenges faced at this time.

22. The North Carolina State Board of Elections has authority to enter into this consent judgment under two separate provisions of the North Carolina General Statutes: sections 163-22.2 and 163-27.1.

23. First, section 163-22.2 authorizes the State Board, "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." This section applies here. The proposed consent judgment is an "agreement with the courts." The State Board, moreover, has made the reasonable decision to enter into this agreement to avoid "protracted litigation" regarding plaintiffs' claims with an election fast approaching.

24. Second, section 163-27.1 authorizes the Executive Director of the State Board to "exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by" a "natural disaster." A "natural disaster" includes a "[c]atastrophe arising from natural causes [that] result[s] in a disaster declaration by the President of the United States or the Governor." 08 NCAC 01.0106. The COVID-19 pandemic constitutes a natural disaster within the meaning of the statute, as shown by the declaration of emergency by the Governor, the

declaration of disaster by the President, and the emergency order that the Executive Director issued under this authority on July 17, 2020. The Executive Director therefore had the statutory authority to issue the Numbered Memoranda that form the basis of this consent judgment pursuant to her emergency powers under section 163-27.1.

25. Accordingly, votes cast and counted pursuant to the Numbered Memoranda and the consent judgment are lawfully cast votes under North Carolina law, because the North Carolina State Board of Elections and its Executive Director validly issued the Numbered Memoranda and entered into the consent judgment under their statutory authority conferred on them by the General Assembly.

26. Sections 1-72.2 and 120-32.6 of the North Carolina General Statutes do not alter the State Board's authority under sections 163-22.2 or 163.27.1. Nor do they provide that the Speaker and the President Pro Tem are necessary parties to the consent judgment in this case.
As an initial matter, the authority delegated to the State Board in sections 163-22.2 and 163-27.1 is more specific than the more general grants of authority listed in sections 1-72.2 and 120-32.6. More specific grants of statutory authority control over more general grants. Here, therefore, the more general grants of certain litigation authority in sections 1-72.2 and 120-32.6 do not displace the settlement and emergency powers of the State Board.

27. In addition, sections 1-72.2 and 120-32.6 allow the Speaker and the President Pro Tem to appear and be heard, or in some cases to request to do so, in certain lawsuits on behalf of the legislative branch alone. However, this limited authority does not allow these legislators to represent the interests of the executive branch or of the State, including any interest of the State in the execution and enforcement of its laws. These statutes do not authorize the Speaker and the

President Pro Tem, individually or jointly, to control executive officials' decisions about execution and enforcement of state law, or to prevent executive officials from entering into settlements that affect how statutes are executed or enforced after their enactment. Nor do these statutes make the General Assembly or these legislative officers necessary parties to any such settlement. To read sections 1-72.2 and 120-32.6 otherwise would violate the North Carolina Constitution's separation of powers clause. *See* N.C. Const. art. I, § 6; *Cooper v. Berger*, 370 N.C. 392, 414-15, 809 S.E.2d 98, 111-12 (2018).

28. For all these reasons, therefore, the consent of the Speaker and the President Pro Tem is not needed for this Court to approve and enter this consent judgment.

29. Because the North Carolina General Statutes delegate to the State Board the authority to issue the directives that form the basis for the proposed consent judgment, neither the Numbered Memoranda, nor the consent judgment itself, violates the Elections Clause of the U.S. Constitution, art. I, § 4, cl.1.

30. Neither the Numbered Memoranda, nor the consent judgment itself, violates the Equal Protection Clause of the U.S. Constitution, amend. XIV, § 1. They provide adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them. They do not dilute or discount anyone's vote. Instead, they ensure that all eligible voters have an opportunity to cast their ballots and correct any deficiencies in those ballots under the same, uniform standards.

31. The Numbered Memoranda and the consent judgment are therefore consistent with both the North Carolina Constitution and the U.S. Constitution.

32. Based upon the foregoing, on October 2, 2020, Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment was granted and final judgment was entered.

ISSUED, this 5th day of October 2020, *nunc pro tunc* October 2, 2020.

G. Bryan Collins
Special Superior Court Judge

CERTIFICATE OF SERVICE

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This the 5th day of October, 2020.

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No._____ TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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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, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS, Defendants, 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, and, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., and NORTH CAROLINA REPUBLICAN PARTY, Republican Committee Intervenor-Defendants.	From Wake County No. 20-CVS-8881

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PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY AND EXPEDITED REVIEW

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

The Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), Donald J. Trump for President, Inc., and the North Carolina Republican Party ("NCRP") (collectively the "Republican Committees"), respectfully (1) petition this Court to issue a writ of supersedeas suspending the Superior Court's October 2, 2020 order; and move to: (2) temporarily stay enforcement of the Superior Court's October 2, 2020 Order during review of the petition for writ of supersedeas; and (3) expedite the briefing and resolution of this appeal.

INTRODUCTION

Absentee voting for the November 2020 election has been underway in North Carolina since September 4, 2020. *See* N.C.G.S. § 163-227.10. On October 2, 2020, however, a single judge in the Superior Court entered an order approving a Consent Judgment between the Plaintiffs and the North Carolina State Board of Elections and Damon Circosta (collectively the "BOE"). Leland Decl., Ex. 1, Order. The Consent Judgment substantially alters absentee voting laws in this State through three attached BOE "Numbered Memos." *See* below at pp. 12–14. The other parties were excluded from negotiating the Consent Judgment and opposed its entry. As of October 4, 2020, according to reported numbers from the BOE, 1,157,606[1] North Carolinians had requested an absentee ballot and 340,795[2] had returned completed absentee ballots to the BOE. The Consent Judgment further conflicts with the orders of *three* other courts to address related issues. Leland Decl., Ex. 2, *Chambers v. N.C.*, Case No. 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Sept. 3, 2020) (Lock, J., Bell, J., Hinton, J.); *Democracy North Carolina v. North Carolina*

[1] *See* https://www.ncsbe.gov/ for an updated total.
[2] *See* https://www.ncsbe.gov/results-data/absentee-data.

State Bd. of Elections, No. 1:20-cv-457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) (Osteen, J.); *Wise v. North Carolina State Board of Elections*, No. 5:20-cv-505-D (E.D.N.C.) (Dever, J.). Those other three decisions are consistent with recent orders by the Supreme Court, including an October 5, 2020 order staying the decision of a South Carolina District Court, which had enjoined South Carolina's witness requirement for absentee ballots. *Andino v. Middleton*, 592 U.S. ___ (2020). In a concurring opinion, Justice Kavanaugh noted that (1) "a State legislature's decision either to keep or make changes to election rules to address COVID—19 ordinarily 'should not be subject to second-guessing by an 'unelected federal judiciary,'" and (2) that "federal courts ordinarily should not alter state election rules in the period close to an election." *Id*. at *2 (citations omitted).

The requested relief is necessary to prevent irreparable harm to the Republican Committees, their constituents, and *all* North Carolinians. The Republican Committees made substantial investments to get out the vote for their preferred candidates and to educate voters about the election laws, which will be lost if the Consent Judgment goes into effect and substantially alters the voting laws. *See* Leland Decl., Ex. 3, Dore Decl. ¶¶ 11–13; Leland Decl., Ex. 4, White Decl. ¶¶ 7–10; Leland Decl., Ex. 5, Dollar Decl. ¶¶ 10–11; Leland Decl., Ex. 6, Clark Decl. ¶¶ 7–9. A stay is also in the public interest. If the Consent Judgment goes into effect, the hundreds of thousands of voters who previously cast their absentee ballots in accordance with the rules then in effect would be treated differently than voters who cast their absentee ballots afterwards. Leland Decl, Ex. 7, *Moore*, No. 20-CV-507, Order at *12–15 (E.D.N.C. Oct. 3, 2020) (enjoining enforcement of the Numbered Memos that are incorporated into the Consent Judgment and noting that those who have already voted absentee would be irreparably harmed absent injunctive relief). The public interest also weighs in favor of a stay because the Consent Judgment would undermine provisions of the voting law designed to safeguard the election from fraud and maintain public

confidence in the integrity of the election. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008) (noting the public interest strongly favors safeguarding "public confidence in the integrity of the electoral process."). Similarly, the changes contemplated by the Consent Judgment would undermine the orderly administration of the election. *Id*. at 195 (noting the State has a compelling interest in promoting the "orderly administration" of elections).

A stay is also required because the Republican Committees are likely to prevail on the merits of their appeal. First, only a three-judge panel of the Superior Court has authority to enter the Consent Judgment because it alters laws enacted by the General Assembly for ***all*** North Carolinians. N.C.G.S. § 1-81.1 (a1); N.C.G.S. § 1-267.1(c). Second, the Consent Judgment does not meet the standards for approval because it was not agreed to by necessary parties and it is not fair, adequate, and reasonable. *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."); *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (consent decree must be fair, adequate, and reasonable). Third, the Consent Judgment violates the United States Constitution because it intrudes on the General Assembly's authority under the United States Constitution to set the time, place, and manner for the November election and the appointment of Electors for President, and because it violates the Equal Protection Clause. U.S. Const., Art. II, § 4; U.S. Const., Art. II, § 1; Leland Decl, Ex. 7, *Moore*, No. 20-CV-507, Order at *19 (E.D.N.C. Oct. 3, 2020) (finding plaintiffs likely to prevail on Equal Protection challenge to the Consent Judgment). Fourth, in agreeing to the Consent Judgment, the BOE exceeded its authority by adopting changes to the voting laws that were explicitly rejected by the General Assembly.

Expedited briefing and consideration are necessary to resolve this appeal, which is of immense public importance and urgency given the proximity to the November 2020 election.

BACKGROUND

A. North Carolina's Election Code and the BOE's Role in Administering Elections.

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 created the option for absentee voting in 1917,[3] 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 Consent Judgment purports to modify this method through its attached Numbered Memos. Under the General Statues, 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,[4] North Carolina enacted

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[3] *See Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 347 (1920).

[4] 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. 8, 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. 9, 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. 8, 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

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 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).

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voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

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.*

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[5] and considered many proposals. The BOE advanced several, including a proposal to reduce or eliminate the witness requirement for absentee ballots. Leland Decl., Ex. 11, 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, such as the one in Wisconsin, as well as reports of challenges faced by the United States Postal Service ("USPS") during and apart from those elections. The General Assembly was also 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, and from that incident understood the importance of ballot security measures such as restricting who can assist voters with the request for, completion, and delivery of absentee ballots. *See* Leland Decl., Ex. 12, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019).

5 Leland Decl., Ex. 10, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3.

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,[6] 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."[7] 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).

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.

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6 Leland Decl., Ex. 13, HB 1169, Voting Record.

7 *See* Leland Decl., Ex. 10, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

C. 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 groups, who seized the COVID-19 pandemic as a bases to legislate long-desired absentee voting changes through the courts. *E.g.,* Leland Decl., Ex. 14, 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 v. North Carolina State Bd. of Elections*, No. 1:20-cv-457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) (Osteen, J.). 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 his 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. 15), 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 BOE's prompt action in implementing the Cure Process, the Democratic Party and related organizations remained undeterred. They continued to press forward with this lawsuit and four other 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.[8] All of those lawsuits were filed against the BOE, and the Legislative Defendants were granted intervention in each case. Except for *Chambers*, in every lawsuit 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 involved a challenge to the Witness Requirement. On September 3, a three-judge panel denied the plaintiffs' motion to preliminarily enjoin the Witness Requirement. *See* Leland Decl., Ex. 2, *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.

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[8] *See DSCC v. N.C. State Bd. of Elections*, No. 20-CVS-69947 (Sup. Ct. Wake Cnty. Sept. 8, 2020) (challenging Cure Process); *Stringer v. North Carolina*, No. 20-CVS-5615 (Sup. Ct. Wake Cty. May 4, 2020) (challenges similar to those in this 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).

Specifically, the panel 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).

D. The Plaintiffs' Lawsuit and the Superior Court's Approval and Entry of the Consent Judgment.

Plaintiffs filed their complaint on August 10, 2020. The Legislative Defendants intervened in their respective official capacities. On August 18, 2020, Plaintiffs filed an amended complaint and a motion for a preliminary injunction. Among other things, the Amended Complaint requested the court to "[s]uspend the Witness Requirement for single-person or single-adult householder" 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." Leland Decl., Ex. 16, Am. Compl. at 4. On August 24, 2020, the Republican Committees moved to intervene as defendants as well. Although the Legislative Defendants and Republican Committees moved to send the case to a three-judge court as a facial challenge, Plaintiffs—joined by the BOE—opposed that request and Judge Collins retained jurisdiction. On September 22, 2020, Plaintiffs and the BOE filed a motion seeking entry of a Consent Judgment. On September 25, the Superior Court granted the Republican Committee's motion to intervene. The Superior Court held a hearing on the Motion for Entry of a Consent Judgment on October 2, and approved and entered the Consent Judgment between Plaintiffs and the BOE that same day. The Legislative Defendants and the Republican Committees played no role in the negotiation of the Consent Judgment and opposed its entry.

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 of Perkins Coie, 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. 17, 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. 18, 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,[9] Virginia,[10] and Minnesota.[11] 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.

E. The Consent Judgment's Purported Changes to North Carolina's Voting Law.

The Consent Judgment purports to resolve Plaintiffs' lawsuit by substantially altering North Carolina's voting procedures though three BOE "Numbered Memos," which are attached to and a part of the Consent Judgment. The Numbered Memos: (1) extend the deadline for receipt of mailed-in ballots from three days after election day, as plainly specified in the statute, to nine

[9] *Common Cause R.I. v. Gorbea*, 20-cv-00318, 2020 WL 4365608 (D. RI July 30, 2020).
[10] Leland Decl., Ex. 19, *League of Women Voters of Va. v. Va. State Bd.*, 20-cv-24, (W.D. Va. Aug. 21, 2020).
[11] Leland Decl., Ex. 20, *LaRose v. Simon*, 62-CV-20-3149, (Ramsey Cty. Dist. Ct. July 17, 2020).

days after election day; (2) effectively eliminate the statutory requirement that one person witness an absentee ballot; (3) emasculate the statutory requirement that only mailed ballots postmarked by 5:00 p.m. on election day be counted; and (4) neuter restrictions on who can handle and return completed ballots. The changes to North Carolina's voting law enacted by the Consent Judgment are as follows:

Receipt deadline. The voting law 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). 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. 21, Numbered Memo 2020-22 at 1.

Witness requirement. The voting law was recently revised by the General Assembly to reduce, for the 2020 election, the requirement that two individuals witness a voter's absentee ballot to a one-witness requirement. HB 1169 § 1.(a). The BOE's Revised 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. 22, 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 unwitnessed certification, the BOE will count the ballot.

Postmark requirement. With respect to absentee ballots that are mailed by USPS and received within three days of the election, the voting laws 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, Numbered Memo 2020-22 provides 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. 21, 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).[12]

Ballot delivery and assistance bans. Pursuant to the laws enacted by the General Assembly, 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 Consent Judgment 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.

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[12] *See* also USPS processing guidelines, https://about.usps.com/handbooks/po408/ch1_003.htm.

F. The United States District Court's Concern with Revised Numbered Memo 2020-19.

Plaintiffs have alleged that one of the three Numbered Memos incorporated into the Consent Judgment—Revised Numbered Memo 2020-19—responds to the U.S. District Court's decision in *Democracy North Carolina*, 2020 WL 4484063. *See* Consent Judgment at 5 (referencing injunction in *Democracy North Carolina*).

On September 28, 2020, six days after the BOE and the plaintiffs in this case filed their motion with the Superior Court to approve the Consent Judgment, they filed a copy of the Revised Numbered Memo 2020-19 with the Middle District.

Shortly after reviewing that filing, on September 30, 2020, the Middle District ordered a status conference at the "earliest possible date and time," stating it "d[id] not find [Revised Numbered Memo 2020-19] consistent with [it's] previous order" because "it appear[ed] to th[e] court that Memo 2020-19 . . . may be reasonably interpreted to eliminate the one-witness requirement under the guise of compliance with th[e] court's order." Leland Decl., Ex. 23, *Democracy North Carolina*, No. 20-cv-00457, Order at *12 (M.D.N.C. Sept. 30, 2020). That same day, the *Democracy North Carolina* plaintiffs filed a motion asking the court to enforce its order granting in part and denying in part those plaintiffs' motion for a preliminary injunction, or in the alternative, to clarify and expedite clarification of the same order. Leland Decl., Ex. 24, Motion.

The court subsequently ordered additional briefing and scheduled a status conference for October 7, 2020. Leland Decl., Ex. 25, *Democracy North Carolina*, No. 20-cv-00457, Order (M.D.N.C. Oct. 1, 2020); Leland Decl., Ex. 26, *Democracy North Carolina*, No. 20-cv-00457, Order (M.D.N.C. Oct. 2, 2020). The court specified that, "[c]ontrary to the [BOE Defendants'] suggestion," it did "not intend to instruct state officials on how to conform their conduct to state law." Leland Decl., Ex. 26, *Democracy North Carolina*, No. 20-cv-00457, Order, Dkt. 152, at *5

(M.D.N.C. Oct. 2, 2020). And it continued to express concern that its "preliminary injunction was used to obtain relief [(i.e. elimination of the Witness Requirement) that the] court denied in the first instance." *Id*.

G. The United States District Court's Temporary Restraining Order Enjoining Enforcement of the Numbered Memos Attached to the Settlement Agreement.

After Plaintiffs in this case and the BOE moved the Superior Court to enter the Consent Judgment, the Republican Committees and certain other individuals filed suit in the United States District Court for the Eastern District of North Carolina challenging the Consent Judgment under federal law and asserting four counts: (1) violation of the Elections Clause in the United States Constitution, Art. II, § 4; (2) violation of the Electors Clause of the United States Constitution, Art. II, § 1; (3) dilution of the right to vote under the Fourteenth Amendment of the United States Constitution; and (4) denial of equal protection under the Fourteenth Amendment of the United States Constitution. *Wise v. North Carolina State Board of Elections*, No. 5:20-cv-505-D, Complaint, Dkt. 1 (E.D.N.C. Sept. 26, 2020). The Legislative Defendants, also joined by other individuals, filed a complaint in the same court raising similar challenges to the Consent Judgment. *Moore v. Circosta*, No. 20-cv-507-D, Complaint, Dkt. 1 (E.D.N.C. Sept. 26, 2020). With the filing of their complaints, the plaintiffs in *Wise* and *Moore* also filed motions for a temporary restraining order to temporarily enjoin enforcement of the Numbered Memos accompanying the Consent Judgment.

After hearing argument on October 2, the U.S. District Court granted the motions the following day, and temporarily enjoined the defendants in *Wise* and *Moore* from enforcing the Numbered Memos attached to the Consent Judgment "or any similar memoranda or policy statement that does not comply with the requirement of the Equal Protection Clause." Leland Decl, Ex. 7, *Moore*, No. 20-CV-507, Order at *19 (E.D.N.C. Oct. 3, 2020). The order is in effect

until no later than October 16, 2020, and the court noted it is "intended to maintain the status quo." *Id*. The court found the "plaintiffs' argument concerning the Equal Protection Clause persuasive," and concluded that the plaintiffs:

> (1) . . . are likely to succeed on the merits of their claims that the provision in the [Numbered Memos] violate the plaintiff voters' rights under the Equal Protection Clause; (2) . . . 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.

Id. at 12. In evaluating the factors for a temporary restraining order, the court expressed concern that the Numbered Memos would "materially chang[e] the electoral process in the middle of an election after over 300,000 people have voted," and observed that the temporary restraining order would "restor[e] the status quo for absentee voting in North Carolina," while the court assesses the case. *Id*. at 15. By the same order, both complaints (*Wise* and *Moore*) were transferred to the Judge Osteen in the United States District Court for the Middle District of North Carolina. *Id*. at 19. Judge Osteen has scheduled the motions for preliminary injunction in both Wise and Moore for October 8, at 10:30 am.

H. The Voting To Date in North Carolina.

As Judge Dever determined, the substantial changes to North Carolina voting law envisioned by the Consent Judgment would come a month after absentee mail voting began,[13] and only weeks before the November 2020 election. Indeed, on September 22, 2020—the date the Plaintiffs and BOE filed their motion for entry of the Consent Judgment—the BOE's website noted that, as of 4:40 a.m., 153,664 North Carolina Voters had cast absentee ballots.[14] As of October 4,

[13] Absentee voting by mail began on Sept. 4, 2020 when absentee ballots were mailed to North Carolina voters. *See* N.C.G.S. § 163-227.10.

[14] *See* https://www.ncsbe.gov/results-data/absentee-data.

North Carolinians had requested 1,157,606[15] absentee ballots, and 340,795[16] completed ballots had been returned.

ARGUMENT

I. STANDARD OF REVIEW

North Carolina Appellate Rule of Procedure 23 governs when a writ of supersedeas and temporary stay pending review of the petition for writ of supersedeas may issue. It provides that "[a]pplication may be made to the appropriate appellate court for a writ of supersedeas to stay the . . . enforcement of any judgment . . . which is not automatically stayed by the taking of appeal when an appeal has been taken" and where "extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order." The purpose of a temporary stay and writ of supersedeas is to "preserve the Status quo pending the exercise of appellate jurisdiction." *Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979). Rule 23 requires the applicant to show that the writ should issue "in justice" to the applicant. N.C. R. App. P. 23(c). The limited authority suggests that courts should balance (1) the petitioner's likelihood of success on the merits of the appeal; (2) whether irreparable injury will occur absent a stay, and (3) whether the balancing of the equities supports temporary relief preserving the status quo during the appeal. *See Abbott v. Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820 827 (1981) (stay appropriate where "there [was] some likelihood that plaintiffs would have prevailed on appeal and thus been irreparably injured"); *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117-19, 493 S.E.2d 806, 809-11 (1997) (stay appropriate where failure to stay enforcement "would work a substantial injustice").

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15 *See* https://www.ncsbe.gov/ for an updated total.
16 *See* https://www.ncsbe.gov/results-data/absentee-data.

North Carolina Rule of Appellate Procedure 2 governs the Court's authority to expedite the briefing and resolution of this matter. That rule provides the Court discretionary authority to "suspend or vary the requirements or provisions of any of these rules" in order to (a) prevent manifest injustice to a party, or (b) to "expedite decision in the public interest." N.C. R. App. P. 2. While North Carolina courts apply this rule "cautiously," the rule establishes the appellate authority "to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the court." *Selwyn Village Homeowners Ass'n v. Cline & Co.*, 186 N.C. App. 645, 650, 651 S.E.2d 909, 912 (2007) (quoting *State v. Hart*, 361 N.C. 309, 315–16, 644 S.E.2d 201, 205 (2007)).

II. ALL FACTORS WEIGH IN FAVOR OF ISSUANCE OF A WRIT OF SUPERSEDEAS AND TEMPORARY STAY

A. Writ of Supersedes and Stay Pending Resolution of the Petition for Writ of Supersedes Are Necessary To Avoid Irreparable Harm to the Republican Committees.

A writ of supersedeas and temporary stay are necessary to avoid irreparable harm to the Republican Committees and their members. In addition to the harm to voters, discussed below (Part II.B.), 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. These investments will be wasted if the Consent Judgment goes into effect. *See* Leland Decl., Ex. 3, Dore Decl. ¶¶ 11–13; Leland Decl., Ex. 4, White Decl. ¶¶ 7–10; Leland Decl., Ex. 5, Dollar Decl. ¶¶ 10–11; Leland Decl., Ex. 6, 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 Consent Judgment's 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.

B. A Writ of Supersedeas and Temporary Stay Are Also in the Public Interest.

A writ of supersedeas and temporary stay are also in the public interest. Judge Dever recently concluded that voters who have already cast an absentee ballot are likely to suffer irreparable harm absent a temporary restraining order to restrain enforcement of the Numbered Memos attached to the Consent Judgment. Leland Decl, Ex. 7, *Moore*, No. 20-CV-507, Order at *12–15 (E.D.N.C. Oct. 3, 2020).

In addition, the Consent Judgment undermines the integrity of the electoral 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). As detailed at pp. 12–14, the deal overrides or neuters: (1) the receipt deadline; (2) the Witness Requirement for absentee ballots; (3) the Postmark Requirement; and (4) the Application Assistance and Ballot Delivery bans. The nullification of each of these requirements would increase the risk of voter fraud in the upcoming general election.

Witness Requirement. The Witness Requirement protects the integrity of the election by serving as 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 recent 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. 21, 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. 27, 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.").

Application Assistance and Ballot Delivery bans. 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 Application Assistance and Ballot Delivery bans are integral components 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. . ." Leland Decl., Ex. 28, *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).

Finally, the Consent Judgment will disrupt the orderly administration of the election. The State has a compelling interest in promoting the "orderly administration" of elections through laws such as the Postmark Requirement and receipt deadline. *See Crawford*, 553 U.S. at 195. Not only have absentee ballots begun going out with instructions on how to submit a valid ballot, but the "Judicial Voter Guide," with comprehensive instructions about voting generally, has been printed and is being mailed. Leland Decl., Ex. 29, Bell Aff. ¶ 12. The Consent Judgment would also create a substantial risk of confusion and chaos for voters. To use an obvious example, the Consent Judgment would prohibit voters from using a drop box to submit ballots, but then nevertheless require county boards to count all ballots placed in a drop box. *See* Leland Decl., Ex. 30, Numbered Memo 2020-23 at 3. This new rule is self-contradictory and could confuse voters (not to mention administrators). The extension of the receipt deadline from three days after Election Day to nine days risks giving procrastinating voters another excuse to wait, and perhaps miss the postmark deadline. It could even mislead voters if it turns out that the extension is overturned on appeal before Election Day. *See* Leland Decl., Ex. 21, Numbered Memo 2020-22; *cf. Common Cause v. Thomsen*, 2020 WL 5665475, at *2 (W.D. Wisc. Sept. 23, 2020) (noting this risk). Moreover, extension of the Receipt Deadline and elimination of the Postmark Requirement could

prompt voters to delay submission of their votes until Election Day (or after), causing a flood of last-minute ballots that could swamp election officials and risk lost or miscounted votes.

The changed procedures would also confuse administrators, burden them with training on revised procedures, or both, and interfere with their ability to perform their duties. For example, the BOE already issued a cure process to county boards on August 21. If this revised process goes into effect only six weeks later, county board officials and election workers would need additional training on the new cure process (and the other changes in the Board's memos), taking away precious time from handling and processing absentee ballots. The difficulties of such a process would be exacerbated by the numerous ambiguities in the new Numbered Memos. For instance, election workers would have to determine what "information" on a ballot tracking service is enough to "indicat[e]" that a ballot was in the custody of the USPS or another commercial carrier on or before Election Day. *See* Leland Decl., Ex. 21, Numbered Memo 2020-22. And if a ballot return envelope does not contain a postmark, the county boards must conduct "research" to trace the ballot—even though the BOE has not provided any guidance as to how much research to conduct, what sources to examine, and how long to spend on each ballot. *See id.* That is hardly a recipe for orderly, uniform election administration in which each ballot is counted on an equal basis.

C. The Republican Committees Are Likely to Prevail on Appeal.

A writ of supersedeas and temporary stay are also necessary because the Republican Committees are likely to prevail on the merits. First, although the Consent Judgment was entered by a single judge in the Wake County Superior Court, only a three-judge panel has authority to approve it. Pursuant to N.C.G.S. § 1-81.1 (a1):

> claims [that seek to restrain the enforcement of an act of the General Assembly in whole or in part based on an allegation that the statute is facially invalid] shall be transferred to a three-judge panel . . . if, after all other questions of law in the action

> have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.

N.C.G.S. § 1-81.1 (a1)*; see also* N.C.G.S. § 1-267.1(c). A challenge is facial to the extent it is not limited to the plaintiff's particular case but also seeks to enjoin application of a statute to other individuals. *See State v. Grady*, 372 N.C. 509, 547, 831 S.E.2d 542, 547 (2019); *see also Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999) ("[I]f successful in an as-applied claim the plaintiff may enjoin enforcement of the statute *only against himself or herself* in the objectionable manner, while a successfully mounted facial attack voids the statute in its entirety and in all applications.") (emphasis added) (cited approvingly in *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017), to explain the difference between as-applied and facial challenges). Thus, only a three-judge panel may enter the Consent Judgment because it grants relief beyond the parties to the case. The Consent Judgment: (1) extends the number of days for ***all*** counties to receive ***all*** absentee ballots postmarked by election day from November 6 to November 12, (2) implements new, ***state-wide procedures*** for "curing" any non-compliant absentee ballots, and (3) loosens restrictions ***throughout the state*** on who may deliver an absentee ballot to a voting location. Further demonstrating the facial nature of the Consent Judgment and the necessity of a three-judge panel is the fact that the Consent Judgment is meant to settle not only this lawsuit but also two others that were found to raise facial challenges— *Chambers v. State of North Carolina*, No. 20 CVS 5001242 (Super. Ct. Wake Cnty.), and *Stringer v. North Carolina State Board of Elections*, No. 20-CVS-14688 (Super. Ct. Wake Cnty.). Leland Decl., Ex. 31, BOE Bench Memo at 5-7 (Sept. 15, 2020). Indeed, the Consent Judgment states its purported objective is "to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections," and objective that would be best served by recognizing the facial challenge for what it

is and transferring it to the statutorily required three-judge court. Leland Decl., Ex. 1, Consent Judgment at 14.

Second, the Consent Judgment does not meet the standards for approval. The Superior Court should not have entered the Consent Judgment because the Legislative Defendants and Republican Committees did not approve it. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local No. 93*, 478 U.S. at 529; *see also Hill v. Hill*, 389 S.E.2d 141, 142 (1990) ("The authority of a court to sign and enter a consent judgment *depends upon the unqualified consent of the parties thereto*, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment.") (emphasis added).

The Consent Judgment also lacks the "fairness and adequacy" that is necessary for a court to approve a consent decree. *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). "[B]efore entering a consent decree the court must satisfy itself that the agreement 'is fair, adequate, and reasonable.'" *Id.* (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). To assess a consent judgement's fairness, courts generally weigh the strength of the plaintiffs' arguments against the provided relief. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975) ("If the settlement offer was grossly inadequate, it can be inadequate only in light of the strength of the case presented by the plaintiffs." (citation and internal alterations omitted)). The Consent Judgment here cannot survive such an assessment. Under its terms, Plaintiffs would receive nearly all of their requested relief: including the nullification of the witness requirement, extension of the receipt deadline, elimination of the postmark requirement, and neutralization of the ballot assistance and delivery bans. And the State Board has agreed to grant this relief in exchange for Plaintiffs' abandonment of a series of legal challenges that they have been

consistently losing up to this point. The unfairness of this deal is exacerbated by its timing, as it would impose new rules on prospective absentee voters in North Carolina while threatening to throw the system into chaos. The Consent Judgment would accordingly grant relief that is grossly disproportionate to the strength of Plaintiffs' case, and its entry should be stayed for that reason.

Third, entry of the Consent Judgment violates the Elections, Electors and Equal Protection clauses in the United States Constitution. 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. The only caveat is that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." *Id*. Analogously, the Electors Clause of 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. Neither the North Carolina's "legislature" nor the United States Congress approved the deal. The General Assembly constitutes the "Legislature" of the State of North Carolina, *see* N.C. Const., art. II, § 1, and it has already exercised its exclusive constitutional power to regulate the time, places, and manner of election during the COVID-19 pandemic through the enactment of HB 1169.

In HB 1169, the North Carolina General Assembly stepped forward to fulfill its constitutional responsibility to address the worst pandemic in a century, reaching a carefully-negotiated legislative compromise that garnered overwhelming bipartisan support. The Consent Judgment throws those efforts to the wind in favor of a back room deal cut in secret between unelected officials and a highly partisan organization. The deal would effectively nullify multiple election laws, including: (1) the witness requirement, compare HB 1169 § 1.(a) with Leland Decl.,

Ex. 22, Revised Numbered Memo 2020-19 at 2; *see also Democracy N.C. v. State Bd. of Elections*, No. 1:20-cv-00457-WO-JLW, Dkt. 145, at *7 (M.D.N.C. Sept. 30, 2020) ("[I]t now appears that on September 22, 2020, the North Carolina State Board of elections has eliminated the one-witness requirement under the guise of compliance with this court's order."); (2) the receipt deadline for mailed-in ballots, which the Consent Judgment would extend from ***three*** to ***nine*** days after election day, *compare* N.C.G.S. § 163-231(b)(2) with Leland Decl., Ex. 21, Numbered Memo 2020-22 at 1; (3) the statutory requirement for mailed ballots to be postmarked by 5:00 p.m. on election day, compare N.C.G.S. § 163-231(b)(2) *with* Leland Decl., Ex. 21, Numbered Memo 2020-22 at 2; and (4) the statutory restrictions on who is permitted to assist with and deliver completed ballots, *compare* N.C.G.S. § 163-229(b); id. § 163-231(a)-(b); id. § 163-223.6(a)(5); HB 1169 §§ 1.(a), 2.(a) *with* Leland Decl., Ex. 30, Numbered Memo 2020-23 at 2-3. Under this new regime, a future voter would be able to have his or her absentee ballot counted despite failing to adhere to one or more statutory voting requirements—and despite hundreds of thousands of previous North Carolina voters' being bound by, and subject to having their votes voided for failing to follow, the very absentee voting requirements that the State Board would now nullify. *See also* pp. 12–14 above (discussing changes enacted by the Numbered Memos). Courts have long rejected similar efforts to limit state legislatures' powers under the Elections Clause and the Electors Clause. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (noting that the Michigan legislature's ability to select the method for appointing electors to the Electoral College under the Electors Clause of the U.S. Constitution "cannot be taken from [the Michigan legislature] or modified by [its] state constitution[]"); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887) (noting that any provision of the Rhode Island constitution that sought to "impose a restraint upon the [Rhode Island legislature's] power [to] prescribe[e] the manner of holding . . . elections [of representatives to

Congress]" was void because the Elections Clause of the U.S. Constitution gives the power to the legislature, limited only by Congressional regulations).

Moreover, Judge Dever recently concluded that other plaintiffs are likely to prevail on the merits of their equal protection challenge to the Consent Judgment. Leland Decl, Ex. 7, *Moore*, No. 20-CV-507, Order at *19 (E.D.N.C. Oct. 3, 2020) (finding plaintiffs likely to prevail on Equal Protection challenge to the Consent Judgment).

Fourth, the BOE grossly exceeds its statutory authority by entering the Consent Judgment. While the BOE has the power to exercise "general supervision over the primaries and elections in the State," it is expressly prohibited from implementing rules and regulations that "conflict with any provisions of this Chapter." N.C.G.S. § 163-22(a); *see also id.* § 163-22(c) (providing that the BOE "shall compel observance of the requirement of the election laws by the county boards of elections and other election officers"). Similarly, another statute provides that the BOE's authority "to make reasonable interim rules and regulations with respect to the pending primary or election" is subject to the following constraint: those rules must "not conflict with any provisions of this chapter 163 of the General Statutes." *Id.* § 163-22.2. [17] Even if the BOE were acting pursuant to its "emergency powers to conduct an election in a district where the normal schedule for the election is disrupted" due to a "natural disaster" under N.C.G.S. § 163-27.1(a), [18] that same statute

[17] Section 163-22.2 does not apply. It requires as a precondition that a state or federal court hold all or part of the election statutes "unconstitutional or invalid." That has not happened. Judge Osteen did not invalidate a single provision; he held that the Board was required to provide due process to a voter before rejecting an absentee ballot. *See Democracy N.C.*, 2020 WL 4484063, at *64. Further, the challenges to HB 1169 have moved swiftly and are not "protracted." And as shown the Stipulated Judgment conflicts in many material ways with the General Statutes.

[18] On its face, this provision does not apply. It allows the Board to use "emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by . . . a natural disaster." To begin, the General Assembly has already addressed the pandemic "emergency"/"natural disaster," and it would make no sense to interpret this provision to allow the Board to undo what the General Assembly has done based on the very same "emergency"/"natural

mandates that "the Executive Director *shall* avoid unnecessary conflict with the provisions of this Chapter." *Id.* (emphasis added). The Supreme Court of North Carolina has already invalidated actions from the BOE that would have nullified a North Carolina election law requiring that voters register and vote in the precinct in which they reside. *See James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005). This Consent Judgment involves a similar agency attempt to nullify election laws through unilateral administrative action, and its entry should accordingly be stayed pending appeal.

Moreover, the Consent Judgment cannot be entered because the Legislative Defendants are necessary parties to any consent judgment in this case under state law, N.C.G.S. § 120-32.6(b), and they did not consent. Pursuant to N.C.G.S. § 120-32.6, as here, when the "validity or constitutionality of an act of the General Assembly" 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." In fact, they are "lead counsel" and "possess final decision-making authority." *Id*. Because the Legislative Defendants are a necessary party and were not included, the court lacked power to enter the Consent Judgment. *Guilford Cty. v. Eller*, 146 N.C. App. 579, 581, 553 S.E.2d 235, 236 (2001) ("It is well-settled that ''[t]he power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.'"") (citation omitted).

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disaster." Second, the provision authorizes action only in a "district," not statewide. Third, it applies only "when the normal schedule for the election has been disrupted," whereas the 2020 election will proceed on schedule on November 3. And, as indicated, the statute instructs the Board to avoid unnecessary conflict with the statutes.

D. A Writ of Supersedeas and Temporary Stay Would Maintain the Status Quo.

A writ of supersedeas and temporary stay are also appropriate because they would maintain the status quo. *See* Leland Decl, Ex. 7, *Moore*, No. 20-CV-507, Order at *19 (E.D.N.C. Oct. 3, 2020). Voting has been underway since Sept. 4, 2020, and, as of October 4, 2020, 340,795[19] North Carolinians had already voted under the current rules.

III. EXPEDITED REVIEW IS IN THE PUBLIC INTEREST

Expedited review is in the public interest. *See* N.C. Rule App. Proc. 2 (court has discretion to "suspend or vary the requirements or provisions" of the rules to "expedite decision in the public interest"). As of October 4, 2020, the BOE reported that 1,157,606[20] North Carolinians had requested an absentee ballot and 340,795[21] had returned completed absentee ballots to the BOE. The rules for absentee voting thus impact not only the Republican Committees and their members, but also hundreds of thousands of North Carolinians. Moreover, the November election is only weeks away, necessitating prompt resolution of these matters and the procedures by which absentee voting will occur.

CONCLUSION

The Republican Committees respectfully request that the Court grant their petition and motion and (1) temporarily stay enforcement of the Superior Court's October 2, 2020 Order during review of the petition for writ of supersedeas; (2) issue a writ of supersedeas suspending the Superior Court's October 2, 2020 order; and (3) expedite the briefing and resolution of this appeal.

Respectfully submitted this the 5th day of October, 2020.

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19 *See* https://www.ncsbe.gov/results-data/absentee-data.
20 *See* https://www.ncsbe.gov/ for an updated total.
21 *See* https://www.ncsbe.gov/results-data/absentee-data.

Dated: October 6, 2020

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VERIFICATION

Pursuant to Rule 23(c), I have read the foregoing Petition for Writ of Supersedeas and Motion for Temporary Stay and Expedited Review and pursuant to Appellate Rule 23, I hereby certify that the material allegations and contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

R. Scott Tobin

CERTIFICATE OF SERVICE

I certify that I have on this 6th day of October, 2020, served a copy of the foregoing by email and United States mail, postage prepaid, to counsel for the Plaintiffs, Defendants, and Intervenor-Defendants at the following addresses:

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R. Scott Tobin

DECISION 2020

Florida Extends Deadline After Crash of Voter Registration Site

Investigation underway after system had issues on final day to register to vote in state

Published October 6, 2020 • Updated on October 6, 2020 at 8:12 pm

2:35

Florida Voter Registration Extended to Tuesday Evening

Gov. Ron DeSantis is extending the voter registration deadline here in Florida after the state's website crashed. NBC 6's Steve Litz reports.

Florida Gov. Ron DeSantis extended the state's voter registration deadline Tuesday after unexpected and unexplained heavy traffic crashed the state's online system and potentially prevented thousands of enrolling to cast ballots in next month's presidential election.

DeSantis extended the deadline that expired Monday until 7 p.m. EDT Tuesday. In addition to online registration, DeSantis ordered elections, motor vehicle and tax collectors offices to stay open until 7 p.m. local time for anyone who wants to register in person.

"You can have the best site in the world, but sometimes there are hiccups," DeSantis said during a press conference at The Villages, a large retirement community in central Florida. "If 500,000 people descend at the same time, it creates a bottleneck."

Local

9 HOURS AGO

FIU Humiliated in Loss to FCS Foe Jacksonville State

11 HOURS AGO

Pedestrian Hit, Killed by Truck in Hollywood

The state is investigating why its voter registration system crashed on Monday, saying unexpectedly heavy traffic that can't be immediately explained poured in during the closing hours.

With COVID-19 case numbers rising, will you change your daily routine?

Yes, back to quarantine

No, I feel safe

Never left quarantine

Florida Secretary of State Laurel Lee, who oversees the voting system, said the online registration system “was accessed by an unprecedented 1.1 million requests per hour” during the last few hours of Monday.

"At this time, we have not identified any evidence of interference or malicious activity impacting the site," Lee said in a statement Tuesday evening. "We will continue to monitor the situation and provide any additional information as it develops."

Lee had tweeted on Monday that some users experienced delays for about 15 minutes while trying to register due to high volume, but that they had increased capacity.

A civil rights group is threatening to sue if the governor does not extend the deadline. The Lawyers' Committee for Civil Rights Under Law said the breakdown would unjustly deprive thousands of casting ballots for president and other offices.

“We are not going to stand by idly,” said Kristen Clarke, the group's president. She said the group sued Virginia in 2016 after its computer system crashed just before the deadline, winning an extension that allowed thousands of additional voters to register.

Democrats throughout the state have pushed for an extension to the deadline.

"Not planning for a voter registration surge is voter suppression. Not ensuring everyone who wants to register can do so is voter suppression. Not extending the deadline is voter suppression. @GovRonDeSantis & @FLSecofState, you must extend the deadline," tweeted Nikki Fried, Florida's Commissioner of Agriculture and consumer services and the state's highest-ranked Democrat.

Not extending the deadline is voter suppression.

@GovRonDeSantis & @FLSecofState, you must extend the deadline.

Florida voter registration site stops working hours before deadline
Those waiting until the last minute to register to vote experienced problems gaining access to the Florida's voter registration websit...
orlandosentinel.com

10:44 PM · Oct 5, 2020 from Tallahassee, FL

1.7K 921 people are Tweeting about this

"This is just latest attempt from the Republican leaders in Florida to limit democracy. The Florida Voter Registration website not working on the last day to register to vote in Florida is blatant voter suppression. Fix the website, stop the suppression, and let democracy work," Terrie Rizzo, chair of the Florida Democratic Party, said in a statement.

“The utter incompetence of Gov. Ron DeSantis in allowing the state’s voter registration website to crash on the very last day to register for the upcoming November election is, sadly, completely believable,” U.S. Rep. Debbie Wasserman Schultz said. “His administrative buffoonery in operating the state’s unemployment system telegraphed today’s executive ineptitude. However, this particular blunder intimates a continuing pattern of voter suppression that the governor has become notorious for.”

Sarah Dinkins, a Florida State University student, tried to help her younger sister register Monday night. They began trying about 9 p.m. and by 10:30 p.m. had not been successful.

“I feel very frustrated,” she said. “If the voting website doesn’t work, fewer people potentially Democratic voters will be able to vote."

This is not the first major computer shutdown to affect the state government this year. For weeks in the spring, tens of thousands of Floridians who lost their jobs because of the coronavirus pandemic couldn't file for unemployment benefits because of repeated crashes by that overwhelmed computer system, delaying their payments. DeSantis replaced the director overseeing the system but blamed the problems on his predecessor, fellow Republican Rick Scott, who is now a U.S. senator.

2:20

Florida Addresses Problems With Voter Registration Site at Deadline

NBC 6's Julia Bagg has more on what officials are saying after some people claim they may have had their registration denied due to the problems.

AP and NBC 6

This article tagged under:

DECISION 2020 • FLORIDA • RON DESANTIS • LOCAL POLITICS

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, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; AND NORTH CAROLINA REPUBLICAN PARTY; REPUBLICAN COMMITTEE INTERVENOR-DEFENDANTS. _____	)	**LEGISLATIVE DEFENDANTS' OPPOSITION TO PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT**

Intervenor-Defendants 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 ("Legislative Defendants"), respectfully submit this opposition to Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

I. Introduction

The motion for entry of a consent judgment currently before the Court was reached in secret without the involvement or knowledge of Legislative Defendants—the parties with "final decision-making authority with respect to the defense of" the laws Plaintiffs challenge. N.C. GEN. STAT. § 120-32.6(b). With the filing of the motion, the North Carolina State Board of Elections ("NCSBE") has now joined Plaintiffs in seeking to rewrite the North Carolina General Assembly's carefully considered, balanced structure of election laws and substitute their judgment instead. But the U.S. Constitution expressly vests the General Assembly with the authority to prescribe the times, places, and manner of holding elections for federal office in the State of North Carolina, subject to a legislative check by the U.S. Congress. U.S. CONST. art. I, § 4. And the General Assembly recently revised the election laws—on a bipartisan basis—to address concerns related to the COVID-19 pandemic, including by reducing to one the number of individuals required to witness an absentee ballot, *see* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169") § 1.(a); expanding the pool of authorized poll workers to include county residents beyond a particular precinct, *id.* § 1.(b); allowing absentee ballots to be requested online, by fax, or by email, *id.* §§ 2.(a), 7.(a); giving additional time for county boards to canvass absentee ballots, § 4; and providing over $27 million in funding for election administration, *id.* § 11.

Plaintiffs, however, believe they know better than North Carolina's elected officials what needs to be done to balance the State's interests in election administration, access to the polls, and

election integrity during a global pandemic. Apparently unsatisfied with HB1169, which gives them some, but not all, of what they seek, Plaintiffs filed suit on August 10, 2020, nearly two months after HB1169 was signed into law. They now proffer a proposed consent judgment with the NCSBE that would radically change North Carolina election procedures in contradiction to North Carolina law, including by vitiating the witness requirement, extending the absentee ballot receipt deadline, expanding the category of ballots eligible to be counted if received after election day, undermining the General Assembly's criminal prohibition of the unlawful delivery of completed ballots, and providing a clear avenue for ballot harvesters to submit absentee ballots in drop boxes after hours that will nevertheless be counted.

Fortunately for North Carolinians, Plaintiffs' and the NCSBE's proposed consent judgment fails to satisfy the necessary requirements for this Court to enter it for numerous reasons. First, Legislative Defendants are necessary parties to any consent judgment in this case under state law, N.C. GEN. STAT. § 120-32.6(b), and because they do not consent, the consent judgment cannot be entered. Second, Plaintiffs assert facial challenges to the election laws at issue, thereby divesting this court of jurisdiction. *State v. Grady*, 372 N.C. 509, 522 (2019) (internal quotation marks omitted). Third, the evidence indicates that the proposed consent judgment is a product of collusion, not an arm's length agreement between Plaintiffs and the NCSBE. Fourth, the proposed consent judgment is illegal because it violates the federal Constitution's Elections Clause and Equal Protection Clause. Fifth, the consent judgment is not "fair, adequate, and reasonable," *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (internal quotation marks omitted), because the Plaintiffs are unlikely to succeed on the merits of their claims and the relief contemplated by the proposed consent judgment is vastly disproportionate to the expected harm. And sixth, the consent judgment is against the public interest.

For these and the additional reasons explained below, the Court should deny Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

II. Standard

Because a consent judgment is a "judgment" of this Court, it cannot be entered without the Court's "examin[ation]" and "approval." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). When considering whether to grant a consent judgment, the Court should "not blindly accept the terms of a proposed settlement." *North Carolina*, 180 F.3d at 581. As federal appellate courts have explained, approving a consent judgment "requires careful court scrutiny," not a "mechanistic[] 'rubber stamp.'" *Ibarra v. Tex. Emp. Comm'n*, 823 F.2d 873, 878 (5th Cir. 1987); *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019 (8th Cir. 2002). After all, a "court is more than 'a recorder of contracts' from whom parties can purchase injunctions." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986). It is "an organ of government constituted to make judicial decisions," and it cannot "lend the aid of the . . . court to whatever strikes two parties' fancy." *Id.*; *Kasper v. Bd. of Elections Comm'rs of the City of Chi.*, 814 F.2d 332, 338 (7th Cir. 1987). Instead, every consent judgment must be "examine[d] carefully" to ensure that its terms are "fair, adequate, and reasonable." *United States v. City of Miami*, 664 F.2d 435, 440–41 (5th Cir. 1981) (en banc) (Rubin, J., concurring). The court also "must ensure that the agreement is not illegal, a product of collusion, or against the public interest." *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *Aronov v. Napolitano*, 562 F.3d 84, 91 (1st Cir. 2009) ("A court entering a consent decree must examine its terms to be sure they are fair and not unlawful.").

Particularly where a proposed consent judgment "contains injunctive provisions or has prospective effect, the district court must be cognizant of and sensitive to equitable

considerations." *Ibarra*, 823 F.2d at 878. Moreover, "[i]f the decree also effects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed." *City of Miami*, 664 F.2d at 441 (Rubin, J., concurring); *see also, e.g., Bass v. Fed. Sav. & Loan. Ins. Corp.*, 698 F.2d 328, 330 (7th Cir. 1983). In short, the Court "must assure itself that the parties have validly consented; that reasonable notice has been given possible objectors, that the settlement is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; that it is consistent with the objectives of Congress; and, if third parties will be affected, that it will not be unreasonable or legally impermissible as to them." *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990).

Examination of a plaintiff's likelihood of success on the merits is a necessary component to consideration of whether a consent judgment should enter. The Court must "consider[] the underlying facts and legal arguments" that support or undermine the proposal. *BP Amoco Oil*, 277 F.3d at 1019. While courts need not conduct a full-blown trial, they must "reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.'" *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975).

This Court must determine Plaintiffs' likelihood of success on the merits here for two reasons. First, the proposed consent judgment suspends multiple provisions of North Carolina's duly enacted state election laws. "A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them." *Kasper*, 814 F.2d at 341–42. A "consent judgment in which the executive branch of a state consents not to enforce a law is 'void on its face,'" unless the approving court finds "a probable violation of . . . law." *Id.* at 342. A judge cannot "put the court's sanction on and power behind a decree that

violates Constitution, statute, or jurisprudence." *City of Miami*, 664 F.2d at 441 (Rubin, J., concurring).

Second, the merits are "[t]he most important factor" in determining whether the consent judgment is fair, adequate, and reasonable, since these factors can be examined "only in light of the strength of the case presented by the plaintiffs." *Flinn*, 528 F.2d at 1172. Courts can gauge "the fairness of a proposed compromise" by "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As explained below, the proposed consent judgment here cannot meet the standards necessary for its entry.

While Legislative Defendants recognize that this Court's authority to enter a consent judgment is governed by State, not federal, law, Legislative Defendants' citations to federal cases as persuasive authority on this point are appropriate given the lack of authoritative precedent from the North Carolina courts in this area. *See N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt., LLC*, 836 S.E.2d 754, 758 (N.C. Ct. App. 2019) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance."); *Higgins v. Synergy Coverage Sols., LLC*, No. 18 CVS 12548, 2020 NCBC LEXIS 6, at *54 n.5 (N.C. Super, Ct. Jan. 15, 2020) (unpublished) (explaining that federal cases may be "persuasive to the Court's analysis, especially [in] the absence of North Carolina case law" on a topic); *cf. Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 733 (2004) (recognizing that, when interpreting North Carolina rules of procedure, "[i]n the absence of North Carolina case law, we look to federal cases for guidance"); *Roberts v. Swain*, 353 N.C. 246, 250 (2000) (holding that, in light of the existence of applicable North Carolina precedent, "it was unnecessary for the Court of Appeals to look to federal case law for guidance").

III. Argument

Plaintiffs' and the NCSBE's proposed consent judgment is neither fair nor reasonable nor legal. It suspends constitutional laws that Plaintiffs were unlikely to succeed in attacking. It appears to be not an arm's-length deal between adversaries but a sweetheart deal that gives Plaintiffs substantial changes to the election laws, including some they did not even ask for, while causing North Carolinians confusion and undermining confidence in the integrity of the election. And it is against the public interest, divesting control of the election mechanics from democratically accountable officials and nullifying lawful election provisions. This Court should reject it.

A. The Proposed Consent Judgment Cannot Enter Because Legislative Defendants' Consent, a Necessary Component, Is Lacking

Legislative Defendants intervened as of right in this case as agents of the State on behalf of the General Assembly under N.C. GEN. STAT. §§ 1A-1, 24, 1-72.2(b), and 120-32.6(b). Legislative Defendants are "necessary parties" in every case in which "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," and "in such cases, . . . possess final decision-making authority with respect to the defense of the challenged act . . . or provision of the North Carolina Constitution." *Id.* § 120-32.6(b). Legislative Defendants represent not only the interests of the State in defending its democratically enacted laws, *see Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013); *Karcher v. May*, 484 U.S. 72, 82 (1987), but also the interest of the General Assembly itself in defending the constitutionality of the challenged election law provisions, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803–04 (2015); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019). Consequently, these provisions mandate that any consent judgment cannot enter without the consent of

Legislative Defendants. *Cf. Guilford County v. Eller*, 146 N.C. App. 579, 581, 553 S.E.2d 235, 236 (2001) ("It is well-settled that the power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.") (cleaned up). Indeed, entering a consent judgment over the objection of Legislative Defendants would represent an end-run around the statutes making Legislative Defendants a necessary party to this case and giving them primacy in the defense of state laws from constitutional attack. Because Legislative Defendants have not given consent here, the proposed consent judgment must be rejected.

B. This Court Does Not Have Jurisdiction to Enter the Proposed Consent Judgment Because Plaintiffs' Challenges to the Various Election Laws are Facial.

While we acknowledge the Court has decided to the contrary, we respectfully submit that Plaintiffs' claims are facial for the reasons we have explained in our briefing and argument to the Court. As we have explained, the North Carolina Supreme Court has held that a claim is facial to the extent that it seeks relief for individuals beyond the plaintiffs to the case. *See Grady*, 372 N.C. at 546–47 (citing a civil case, *Doe v. Reed*, 561 U.S. 186, 194 (2010)).

What is more, even if the facial nature of Plaintiffs' claims were not clear from the face of their complaint, it is clearly established by the relief requested in the proposed consent judgment, which is programmatic in nature and to be effectuated through the issuance of Numbered Memos to all 100 county boards of elections throughout the state. *See* Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment at 14–16 ("Proposed Consent Judgment"). Indeed, two limitations on the relief sought that Plaintiffs seized upon to assert that their claims are as applied—the limitation of the challenge to the witness requirement to

individuals who do not reside with another adult and the limitation of the challenge to the ballot receipt deadline to ballots sent through the U.S. Postal Service ("USPS"), *see* Plaintiffs' Response to Intervenor-Defendants' Motion and Cross-Motion for Recommendation for Rule 2.1 Designation at 3 (Aug. 24, 2020)—have disappeared in the proposed consent judgment. Plaintiffs and the NCSBE instead seek to relieve *all* voters of the necessity of complying with the witness requirement and to extend the receipt deadline for *all* ballots sent out for delivery by election day, whether through the USPS or a commercial carrier. *See* Proposed Consent Judgment at 15–16.

Further demonstrating the facial nature of the proposed consent judgment before the Court is the fact that the NCSBE's actions are meant to settle not only this lawsuit but also two others that this Court has found raise facial challenges—*Chambers v. State*, No. 20 CVS 500124, and *Stringer v. N.C. State Bd. of Elections*, No. 20 CVS 5615. *See* Bench Memo at 5–7 (Sept. 15, 2020) (attached as Ex. 1 to Affidavit of Nicole Jo Moss in Support of Legislative Defendants' Opposition to Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment ("Moss Aff.")). Indeed, the proposed consent judgment must be intended to buy NCSBE global peace, otherwise it could not possibly achieve its purported objective "to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections." Proposed Consent Judgment at 14.

For the foregoing reasons, even if Plaintiffs' claims could have been plausibly described as as applied at one time, that is no longer the case. A single judge of this Court therefore lacks jurisdiction to enter the proposed consent judgment, and Plaintiffs' case must be transferred to a three-judge panel immediately. *See* N.C. GEN. STAT. §§ 1A-1, Rule 42, 1-81.1(a1), 1-267.1(a1).

C. This Court Must Not Enter the Proposed Consent Judgment Because There Is a Substantial Risk It Is the Product of Collusion

The substantial risk of collusion at play in this litigation is another reason for the Court to decline to enter the proposed consent judgment. The proposed consent judgment must be rejected because it likely does not reflect arm's-length negotiations and gives a windfall to Plaintiffs. A consent judgment is generally a "request for the court to exercise its equitable powers," which in turn "involves the court's sanction and power and is not a tool bending without question to the litigants' will." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). "[P]arties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *Id.* (quoting *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961)).

Consent judgments must be not only substantively sound but also procedurally fair. Procedural fairness is evaluated "from the standpoint of [both] signatories and nonparties to the decree." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). Consent judgments are procedurally fair when they flow from negotiations "filled with 'adversarial vigor.'" *United States v. City of Waterloo*, No. 15-cv-2087, 2016 U.S. Dist. LEXIS 7224, at *12 (N.D. Iowa Jan. 20, 2016). The parties must "negotiat[e] in good faith and at arm's length." *BP Amoco Oil*, 277 F.3d at 1020. Agreements that lack adversarial vigor become "collusi[ve]," and are, by definition, not fair. *Colorado*, 937 F.2d at 509.

In fact, a consent judgment between non-adverse parties "is no judgment of the court[;] [i]t is a nullity." *Lord v. Veazie*, 49 U.S. 251, 256 (1850). This rule stems from the fundamental requirement that parties be concretely adversarial before a court can act on their claims. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). The requisite adversity plainly is lacking when "both litigants desire precisely the same result."

Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 47–48 (1971); *see also Time Warner Ent. Advance / Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516 (2013) (internal quotation marks omitted) (explaining that a justiciable controversy "entails an actual controversy between parties having adverse interests in the matter in dispute"). In other words, a collusive suit lacks "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process." *United States v. Johnson*, 319 U.S. 302, 305 (1943).

Regrettably, "it is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental actions because of rifts within the bureaucracy or between the executive and legislative branches." *Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part). That is why courts must and do look skeptically at consent judgments used to enact or modify governmental policy. Otherwise, non-adverse parties could employ consent judgments to "sidestep political constraints" and obtain relief otherwise unavailable through the political process. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 317; *see also, e.g.*, *Horne v. Flores*, 557 U.S. 443, 448–49 (2009) (observing that "public officials sometimes consent to . . . decrees that . . . bind state and local officials to the policy preferences of their predecessors and may thereby deprive future officials of their legislative and executive powers"); *Nw. Env't Advocates v. EPA*, 340 F.3d 853, 855 (9th Cir. 2003) (Kleinfeld, J., dissenting) (warning that "consent decrees between advocacy groups and agencies present a risk of collusion to avoid executive and ultimately democratic control over the agencies"); *Carcaño v. Cooper*, No. 16-cv-236, 2019 U.S. Dist. LEXIS 123497, at *21 (M.D.N.C. July 23, 2019) ("[W]here there has been little adversarial activity, a federal court must be especially discerning

when presented with a proposal in which elected state officials seek to bind their successors as to a matter about which there is substantial political disagreement . . . ."). In particular, "judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper*, 814 F.2d at 340; *see Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that a consent decree is a ploy in some other struggle.").

Employing a consent judgment to sidestep political constraints and obtain relief otherwise unavailable through the political process is exactly what is occurring here. The NCSBE, despite Executive Director Bell's March 26, 2020 letter to the General Assembly, failed to convince the General Assembly to adopt all of its recommendations—including many of the same changes that Plaintiffs seek here. For example, the General Assembly considered Executive Director Bell's recommendation that it eliminate the witness requirement but rejected it, deciding to accept her alternative recommendation to reduce to one the witness requirement instead. *See* HB1169 § 1.(a). Moreover, both a state court and a federal court have rejected motions to preliminarily enjoin the witness requirement, finding that plaintiffs in those cases had not shown a likelihood of success on the merits. *See* Order on Injunctive Relief at 6–7, *Chambers v. State*, No. 20 CVS 500124 (N.C. Super. Ct. Sept. 3, 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 U.S. Dist. LEXIS 138492, at *103 (M.D.N.C. Aug. 4, 2020). And according to two NCSBE members who recently resigned, the NCSBE entered into the proposed consent judgment without apprising NCSBE members of the fact that "a lot of the concessions" in the consent judgment had been previously rejected by these courts. *See* Ken Raymond Resignation Letter (Sept. 23, 2020) (attached as Ex. 2 to Moss Aff.); David Black Resignation Letter (Sept. 23, 2020) (attached as Ex. 3 to Moss Aff.). Those same board members were also not apprised of the Legislative Defendants' significant involvement in those cases or that the legislature was not being informed of or consulted

with about the proposed settlement. *See* Affidavit of Ken Raymond (attached as Ex. 4 to Moss Aff.); Affidavit of David Black (attached as Ex. 5 to Moss Aff.). The NCSBE provides no justification for its sudden course reversal in the face of its demonstrated successes in court.

There are other circumstances that raise concerns about potential collusion in this case. The claims here are essentially a subset of the claims asserted in *Stringer*, a case filed by Plaintiffs' counsel several months before this one. The principal difference is that Plaintiffs in this case have attempted (unsuccessfully, in Legislative Defendants' view) to plead their claims as as applied challenges—a characterization the NCSBE has endorsed. The chronology and the NCSBE's ready agreement with Plaintiffs that the claims here are as applied are consistent with collusion between the parties. The August 18, 2020 notice of voluntary dismissal of claims against the State of North Carolina, originally a defendant here, also is consistent with collusion, as it appears to have been done to provide an argument (again, unsuccessfully in Legislative Defendants' view) for why Legislative Defendants' agreement was not necessary for the entry of a consent judgment. *See* N.C. GEN. STAT. § 1-72.2(a) ("[W]hen the State of North Carolina is named as a defendant in [cases in state court challenging the validity of an act of the General Assembly] both the General Assembly and the Governor constitute the State of North Carolina.").

At bottom, a court is not a place where parties with mutual interests can "purchase . . . a continuing injunction." *Clements*, 999 F.2d at 846. Yet that is precisely what the proposed consent judgment seeks. The NCSBE is in effect aligned with Plaintiffs, and this Court should find that the proposed consent judgment bears too many hallmarks of collusion to be appropriately entered by the Court. Accordingly, the proposed consent judgment must be rejected—or, at a minimum, Legislative Defendants must be permitted to take discovery before Plaintiffs' and the NCSBE's motion is decided to investigate the evidence of collusion apparent from the public record.

D. This Court Must Not Enter the Proposed Consent Judgment Because It Is Illegal.

The proposed consent judgment undermines North Carolina's election statutes and effectively nullifies statutes enacted by the General Assembly while depriving the State of its ability to "enforce its duly enacted" laws. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The proposed consent judgment violates two provisions of the federal Constitution that protect North Carolina's elections and the right to vote: the Elections Clause and the Equal Protection Clause.

1. The Proposed Consent Judgment Violates the Elections Clause

The text of the Elections Clause is clear: "[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. I, § 4, cl. 1 (emphasis added). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Neither the NCSBE nor this Court have the authority to override the General Assembly's exercise of this authority through the proposed consent judgment. If entered, therefore, the consent judgment would be unconstitutional because it would overrule the enactments of the General Assembly to regulate the times, places, and manner of holding the upcoming federal election.[1]

The General Assembly is the "Legislature," established by the people of North Carolina. N.C. CONST. art. II, § 1. And the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme

[1] While this Court in *Stringer* did not accept the argument that claims like Plaintiffs' are foreclosed by the political question doctrine (which Legislative Defendants continue to assert), it does not follow that the Elections Clause allows the NCSBE to change the State's election laws without the General Assembly's consent, either with or without this Court's entry of a consent judgment.

judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). With this grant of exclusive legislative power, the General Assembly is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the State. *Id.* Concurrently, this exclusive grant of legislative power means the U.S. Constitution has assigned the role of regulating federal elections in North Carolina to the General Assembly.

The word "Legislature" in 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.*; *see, e.g.*, THE FEDERALIST NO. 27, at 174–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (defining "the State legislatures" as "select bodies of men"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "Legislature" as "the body of men in a state or kingdom, invested with power to make and repeal laws"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (defining "Legislature" as "[t]he power that makes laws"). By choosing to use the word "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch, *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814, and in North Carolina that is the General Assembly.

The Framers had a number of reasons to delegate (subject to Congress's supervisory power) the task of regulating federal elections to state Legislatures like the General Assembly. Specifically, the Framers understood the regulation of federal elections to be an inherently legislative act. After all, regulating elections "involves lawmaking in its essential features and most important aspect." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *cf. Ariz. Indep. Redistricting*

Comm'n, 576 U.S. at 808 (observing that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking"). And so, as one participant in the Massachusetts debate on the ratification of the Constitution explained, "[t]he power . . . to regulate the elections of our federal representatives must be lodged somewhere," and there were "but two bodies wherein it can be lodged—the legislatures of the several states, and the general Congress." 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co., 1881).

Further, the Framers were aware of the possibility that regulations governing federal elections could be ill-designed. James Madison, for instance, acknowledged that those with power to regulate federal elections could "take care so to mould their regulations as to favor the candidates they wished to succeed." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), *available at* https://bit.ly/3kPvZRu. But as with so many other problems the Framers confronted, their solution was structural and democratic. To ensure appropriate regulation of federal elections, the Elections Clause gives responsibility to the most democratic branch of state government—the Legislature—so that the people may check any abuses at the ballot box. And as a further check, the Elections Clause gives supervisory authority to the most democratic branch of the federal government—the U.S. Congress.

The text and history of the Elections Clause thus confirm that the General Assembly is the only constitutionally empowered state entity to regulate federal elections. And as the Supreme Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—the state legislatures' power to prescribe regulations for federal

elections "cannot be taken." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And courts have long recognized this limitation on the power of states to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

The NCSBE has clearly violated the Elections Clause by issuing numbered memos to effectuate the proposed consent judgment that purport to adjust the rules of the election that have already been set by statute, and this Court would be doing the same were it to validate the NCSBE's unconstitutional behavior through entry of the consent judgment. Neither the NCSBE nor this Court have freestanding power under the Constitution to rewrite North Carolina's election laws and to "prescribe[]" their own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. Rather, as noted above, the North Carolina Constitution states that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1, and it makes clear that "[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other, *id.* art. I, § 6. And where there is an exception to this separation, it is expressly indicated. *See id.* art. IV, § 1 ("The judicial power of the State shall, *except as provided in Section 3 of this Article*"—addressing administrative agencies—"be vested in a Court for the Trial of Impeachments and in a General Court of Justice.") (emphasis added). Thus, neither the NCSBE nor this Court are the "Legislature" empowered to adjust the rules of the federal election on their own.

Because the People of North Carolina have not granted legislative power to the NCBSE or the Court, this case is far afield from *Arizona Independent Redistricting Commission*. In that case,

the Supreme Court dealt with a provision of the Arizona Constitution—adopted through popular initiative—that vested an independent state commission with authority over drawing federal congressional districts. The state legislature claimed that the federal Elections Clause rendered that allocation of authority invalid, but the Supreme Court disagreed, concluding that the independent state commission simply acted as "a coordinate source of legislation on equal footing with the representative legislative body." *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 795. But here neither the NCSBE nor this Court have legislative power and are not on equal footing with the General Assembly. Indeed, the North Carolina Supreme Court expressly held that a prior version of the NCSBE "clearly performs primarily executive, rather than legislative or judicial, functions." *Cooper v. Berger*, 809 S.E.2d 98, 112 (N.C. 2018). It therefore struck down provisions limiting the Governor's control over the NCSBE. The current version of the statute does not change the nature of the NCSBE's activities but rather addresses the constitutional infirmities recognized by *Cooper*. *Compare id.* at 114, *with* N.C. GEN. STAT. § 163-19.

Even if it were possible in some circumstances for an executive agency like the NCSBE to exercise the authority to prescribe regulations governing the times, places, and manner of federal elections that the Elections Clause assigns exclusively to the legislature (and it is not), the NCSBE would lack authority to do so here. The NCSBE is a creature of statute. *See* N.C. GEN. STAT. § 163-19(a) ("There is established the State Board of Elections . . . ."). And consistent with being a creature of statute, the NCSBE is limited by the statute that created it. "The State Board of Elections shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations . . . as it may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See id.* § 163-22(a) (emphasis added). Thus, the General Assembly has not granted the NCSBE any power to overrule the duly enacted

statutes governing elections or given it any form of legislative power. Quite the contrary, the NCSBE is not allowed to issue any rules or regulations that "conflict" with provisions enacted by the General Assembly.

To be sure, Executive Director Bell has limited statutory authority to make necessary changes to election procedures in response to "a natural disaster." N.C. GEN. STAT. § 163-27.1. But the current pandemic is not a "natural disaster" under the statute and its implementing regulations "describing the emergency powers and the situations in which the emergency powers will be exercised," *id.*; *see* 8 N.C. ADMIN. CODE 1.0106, and the North Carolina Rules Review Commission unanimously rejected an earlier attempt by Executive Director Bell to extend her emergency powers to the pandemic, *see* Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/3kLAY5y (attached as Ex. 6 to Moss Aff.). In declining to approve the changes to the Rule, the Rules Review Commission explained that the NCSBE "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. *Id.*

The proposed consent judgment will replace the judgment of the General Assembly with that of the NCSBE. But "consent is not enough when litigants seek to grant themselves power they do not hold outside of court." *Clements*, 999 F.2d at 846. Accordingly, "an alteration of the [state] statutory scheme may not be based on consent alone." *Kasper*, 814 F.2d at 342; *see also PG Publ'g Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013) (finding that where no violation of law had been found, court lacked authority to enter a consent decree "that would violate a valid state law"); *Kasper*, 814 F.2d at 341–42 ("A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986) (holding that a consent judgment was "void on its face" because state Attorney General lacked authority to stipulate that a statute was unconstitutional);

League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1055 (9th Cir. 2007) ("A . . . consent decree . . . cannot be a means for state officials to evade state law.").

Recently, the court in *League of Women Voters of Michigan v. Benson*, No. 17-cv-14148, 2019 U.S. Dist. LEXIS 228463 (E.D. Mich. Feb. 1, 2019), denied a motion to enter a consent decree resolving a partisan gerrymandering case. The League of Women Voters had cut a deal with the newly elected Democrat Michigan Secretary of State to require portions of Michigan's redistricting maps to be redrawn. The Republican congressional delegation and two Republican state legislators, who had intervened, objected to the entry of the consent decree. *Id.* at *4. The court declined to enter the consent decree because under the Michigan constitution, only the Michigan Legislature had authority to "regulate the time, place and manner of all . . . elections." *Id.* at *10. The U.S. Constitution, of course, similarly limits authority to regulate federal elections to the General Assembly. And North Carolina's Constitution states that the grant of legislative power to the General Assembly is exclusive. N.C. CONST. art. I, § 6.

The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. Thus, because the proposed consent judgment purports to alter the time, place, and manner for holding the upcoming federal election in a manner that contravenes the General Assembly's duly enacted statutes, its entry would violate the Elections Clause.

2. The Proposed Consent Judgment Violates the Equal Protection Clause

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 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). But the right to vote includes the right to have one's ballot counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted).

To ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000); *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 v. Sanders*, 372 U.S. 368, 380 (1963) ("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."). "[T]reating voters different" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001).

At a minimum then, the Equal Protection Clause requires the "nonarbitrary treatment of voters" and forbids voting practices that are "standardless," without "specific rules designed to ensure uniform treatment." *Bush*, 531 U.S. at 103, 105–06; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). Consequently, the "formulation of uniform rules" is "necessary" because the "want of" such rules may lead to "unequal evaluation of ballots." *Bush*, 531 U.S. at 106.

If entered, the proposed consent judgment would violate these constitutional requirements, thereby infringing on the Equal Protection rights of those 153,664 North Carolina voters who had

already cast their absentee ballots before the proposed consent judgment was announced[2] to "participate in" the upcoming election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336, and the Equal Protection right of all North Carolina voters to have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29.

i. The Proposed Consent Judgment Subjects Voters in the Same Election to Different Regulations

First, if the proposed consent judgment is entered, North Carolina will be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. As discussed above, North Carolina law requires all absentee ballots to be witnessed by one qualifying adult. *See* HB1169 § 1.(a). North Carolina prohibits any person other than a voter's "near relative" or "verifiable legal guardian" from delivering a completed absentee ballot to a county board of elections. N.C. GEN. STAT. § 163-226.3(a)(5). And North Carolina also requires absentee ballots to be received, at the latest, by 5:00 p.m. three days after election day. These provisions governed the absentee ballot submission process for the 153,664 voters who had already cast their absentee ballots before the proposed consent judgment was announced. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the proposed consent judgment.[3] The proposed consent judgment is thus a sudden about-face on the rules governing the ongoing election that upends the careful bipartisan framework that has structured voting so far.

While the proposed consent judgment effectively nullifies the witness requirement and the ballot harvesting ban, the NCSBE has also been plainly inconsistent in what each provision

[2] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

[3] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

requires. On August 21, 2020, the NCSBE explained in Numbered Memo 2020-19 that a failure to comply with the witness requirement was a deficiency that *could not* be cured by a post-submission affidavit. *See* N.C. State Bd. of Elections, Numbered Memo 2020-19 ("Original Numbered Memo 2020-19") at 2 (Aug. 21, 2020) (attached as Ex. 7 to Moss Aff.). Instead, the relevant county board of elections was required to spoil the ballot and reissue a new ballot along with an explanatory notice to the voter. *Id.* The lack of a witness was a problem that no affidavit could cure. *Id.* Notably, in federal litigation challenging the witness requirement, Executive 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. ("*Democracy N.C.* 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 as Ex. 8 to Moss Aff.).[4]

The NCSBE then arbitrarily changed course and issued an updated Numbered Memo 2020-19 on September 22, 2020 as part of the proposed consent judgment. The new memo explains that an absentee ballot entirely devoid of witness information may be cured with a certification from the voter. *See* N.C. State Bd. of Elections, Numbered Memo 2020-19 at 2–4 (Sept. 22, 2020), https://bit.ly/3666pTV (explaining that deficiencies curable by a certification from the voter include a witness or assistant failing to write their name, address, or signature). This absentee "certification" will transmogrify an entirely unwitnessed (and hence invalid) ballot into a lawful, compliant ballot. All the NCSBE's proposed consent judgment requires is that the voter merely

[4] Indeed, that is precisely what was happening across the State as the example from Cumberland County provided in the Affidavit of Linda Devore ("Devore Aff.") (attached as Ex. 18 to Moss Aff.) makes clear. Ms. Devore explains how prior to receiving the revised Numbered Memo 2020-19, her county issued hundreds of notifications to voters whose absentee ballot return envelope lacked a witness signature that their ballot would be spoiled and issued them new ballots. *See id.* ¶ 19.

affirm that the voter "voted and returned [her] absentee ballot for the November 3, 2020 general election and that [she] ha[s] not voted and will not vote more than one ballot in this election." Proposed Consent Judgment at 37. The certification does not require voters to affirm that they had their ballots witnessed in the first place or even attempted to follow this important aspect of the law.

The update to Numbered Memo 2020-19 is not required by or even supported by the federal court's preliminary injunction in *Democracy N.C.* This is shown by the text of that order, the evidence in the case, and the chronology of the NCSBE's actions.

The *Democracy N.C.* order enjoined the NCSBE "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." *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *177 (M.D.N.C. Aug. 4, 2020). The evidence in the case made clear that ballots lacking a witness signature are not subject to remediation. As explained above, Executive 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. *Democracy N.C.* Tr. at 122. Thus, since failing to procure a witness is not "subject to remediation," any cure for a voter's failure to comply with the witness requirement is *outside the scope* of the remedy ordered by the Middle District of North Carolina.

This understanding of the *Democracy N.C.* order is reflected in the original Numbered Memo 2020-19 that the NCSBE released on August 21, 2020. *See* Original Numbered Memo 2020-19. This version of the Memo *did not allow* a cure for lack of a witness, but instead listed errors in the witness certification as deficiencies that "cannot be cured by affidavit, because the missing information comes from someone other than the voter," therefore requiring ballots with

such errors "to be spoiled." *Id.* at 2. To be clear, Legislative Defendants are not challenging here Numbered Memo 2020-19 in its original form, but only as amended on September 22, 2020 to eviscerate the witness requirement.

The original form of Numbered Memo 2020-19 makes implausible any claim that the NCSBE understood the *Democracy N.C.* injunction to require the new cure procedures gutting the witness requirement in the amended Numbered Memo 2020-19. As explained above, the court enjoined the NCSBE from "permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation." Yet, in response to this order, the NCSBE issued guidance not only *allowing* but *requiring* the rejection of absentee ballots with witness deficiencies. If the new cure procedures truly were required by the *Democracy N.C.* order, that would mean the NCSBE was acting in open defiance of a court order from August 21 until the amendment of Number Memo 2020-19 on September 22, 2020. While this is implausible standing alone, it is even more so given that the plaintiffs in *Democracy N.C.* have not challenged the scope of Numbered Memo 2020-19 as originally drafted.[5]

The *Democracy N.C.* court has now confirmed our interpretation: "This court does not find Memo 2020-19 'consistent with the Order entered by this Court on August 4, 2020,' and, to the degree this court's order was used as a basis to eliminate the one-witness requirement, this court finds such an interpretation unacceptable." Order at 10, *Democracy N.C.*, No. 20-cv-457, (M.D.N.C. Sept. 30, 2020), ECF No. 145 (citation omitted).

The proposed consent judgment goes further by allowing absentee ballots to be received up to *nine days* after election day. Proposed Consent Judgment at 19, 28. This is both in violation

[5] The NCSBE filed the amended Numbered Memo 2020-19 with the *Democracy N.C.* court on September 28, but in that filing it did not claim that the procedures outlined there are *required* by the preliminary injunction but rather only "consistent with" it. *See* Notice of Filing, *Democracy N.C.* (Sept. 28, 2020), ECF No. 143 (attached as Ex. 21 to Moss Aff.).

of the General Assembly's duly enacted statutes but also a further change in the rules while voting is ongoing. The proposed consent judgment also provides a standardless approach by allowing even the anonymous delivery of ballots—facilitating violations of N.C. GEN. STAT. § 163-226.3's prohibition on the delivery of ballots by all but a select few—to unmanned boxes at polling sites. Proposed Consent Judgment at 38–42.

Accordingly, if the proposed consent judgment is entered, North Carolina will necessarily be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. *See Bush*, 531 U.S. at 106. Over 150,000 voters cast their ballots before the proposed consent judgment was unveiled, and therefore worked to comply with the witness requirements and lawful delivery requirements. There is no justification for subjecting North Carolina's electorate to this arbitrary and disparate treatment, especially given that both a North Carolina state court and a North Carolina federal court have rejected motions to preliminarily enjoin the witness requirement, finding that plaintiffs in those cases had not shown a likelihood of success on the merits. *See* Order on Injunctive Relief at 6–7, *Chambers*; *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103. For the NCSBE to suddenly reverse course and capitulate to Plaintiffs' demands despite this demonstrated success in court raises questions as to the rationale underlying a sudden change in policy in the midst of an ongoing election.

ii. The Proposed Consent Judgment Will Dilute Lawfully Cast Votes

Second, if the proposed consent judgment is entered, the NCSBE will be violating North Carolina voters' rights to have their votes counted without dilution. *Reynolds*, 377 U.S. at 555 n.29. The proposed consent judgment ensures that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in four ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Proposed Consent Judgment

at 31–36; (2) by allowing absentee ballots to be counted if received up to nine days after election day, *see id.* at 28–29; and (3) by allowing absentee ballots without a postmark to be counted in certain circumstances if received after election day, *id.*; and (4) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see id.* at 38–42. These changes are open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the votes of North Carolina voters.

The proposed consent judgment is a denial of the one-person, one-vote principle affixed in the Supreme Court's jurisprudence. Dilution of lawful votes, to any degree, by the casting of unlawful votes violates the right to vote. *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Moreover, those practices, such as the NCSBE's that promote fraud and dilute the effectiveness of individual votes by allowing illegal votes, violate the Fourteenth Amendment too. *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."). Thus, when the NCSBE purposely accepts even a single ballot without the required witness, accepts otherwise late ballots beyond the deadline set by the General Assembly, or facilitates the delivery of ballots by unlawful parties, the NCSBE has accepted votes that dilute the weight of lawful North Carolina votes.

* * *

Accordingly, if the proposed consent judgment is entered, the NCSBE will not only be administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast their absentee ballots before the proposed consent judgment was announced "to participate in" the election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336, but it will also be purposefully allowing otherwise unlawful votes to be counted,

thereby deliberately diluting and debasing North Carolina voters' votes. These are clear violations of the Equal Protection Clause.

E. This Court Must Not Enter the Proposed Consent Judgment Because It Is Not Fair, Adequate, and Reasonable

The proposed consent judgment must be rejected because it is not fair, adequate, and reasonable. In considering these characteristics, a court must "assess the strength of the plaintiff's case." *North Carolina*, 180 F.3d at 581. The merits of the claims at issue are "[t]he most important factor" because fairness, adequacy, and reasonableness can be examined "only in light of the strength of the case presented by the plaintiffs." *Flinn*, 528 F.2d at 1172. Courts gauge "the fairness of a proposed compromise" by "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered." *Carson*, 450 U.S. at 88 n.14. Here, because Plaintiffs are unlikely to succeed on the merits of their claims, and because the relief afforded by the proposed consent judgment is vastly disproportionate to the purported harm, the proposed consent judgment is not fair, adequate, and reasonable, and must not be entered.

1. Plaintiffs Are Unlikely to Succeed on the Merits of Their Claims

Plaintiff's legal theories, evidence, and expert reports have significant weaknesses that render their claims unlikely to succeed on the merits. Each will be discussed in turn below.

i. Plaintiffs' Cannot Possibly Succeed In Showing that the Challenged Statutes are Unconstitutional in all of their Challenged Applications.

As explained above, Plaintiffs' claims—particularly viewed in light of the proposed consent judgment—are facial. But regardless of whether the Court agrees with that characterization, to succeed Plaintiffs must demonstrate that the challenged provisions are unconstitutional *in all the applications for which Plaintiffs seek to have them invalidated.* For these purposes, "the label is not what matters and to the extent that a claim and the relief that would

follow reach beyond the particular circumstances of the party before the court, the party must satisfy [the] standards for a facial challenge to the extent of that reach." *Grady*, 372 N.C. at 547 (cleaned up) (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)). It is well established that "[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 138 (2018) (internal quotation marks and brackets omitted), *aff'd*, 139 S. Ct. 2213 (2019). Under this "exacting standard," *id.*, therefore, Plaintiffs "must establish that [the challenged provisions are] unconstitutional in all of [their challenged] applications" during the COVID-19 pandemic. *Grady*, 372 N.C. at 522 (internal quotation marks omitted). Plaintiffs do not even seriously attempt to carry their burden of showing that *all* challenged applications of the challenged provisions are unconstitutional during the pandemic.

As will be explained below, Plaintiffs cannot even credibly demonstrate that *they themselves* are meaningfully injured by North Carolina's generous early voting opportunities, by the requirement to find a single witness, by having to pay the postage for mailing a completed ballot, by the speculative possibility that the delivery of their ballots might suffer from a mail delay, and by the prohibition on third-party ballot harvesting. Indeed, at least two of the Plaintiffs—Tom Kociemba and Rosalyn Kociemba—*have already voted*. *See* N.C. State Bd. of Elections, Voter Search, https://bit.ly/2HNjzLL (search Thomas Kociemba and Rosalyn Kociemba).[6] They certainly have not established that these measures impose an unconstitutional burden in every circumstance. Plaintiffs have not established that the risk of polling place

[6] These are two of the plaintiffs whose depositions Plaintiffs unilaterally cancelled after the filing of the proposed consent judgment. They signed declarations on August 30 stating, "I usually hand-deliver my absentee ballot to the county board of elections, but I do not want to do so this year because of potential exposure to COVID-19" or "to avoid unnecessary exposure to COVID-19." *See* R. Kociemba Aff. ¶ 5; To Kociemba Aff. ¶ 6. According to the NCSBE voter lookup tool cited in the text, their ballots were hand-delivered a little over a week later, on September 8.

consolidation or reduced hours is so dire that it has imposed unconstitutional burdens on *all* in-person voters, and even if "crowds and long lines" occur at some voting locations, Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Pls.' Mem.") at 36, that will obviously not be the case everywhere, so Plaintiffs' facial challenge must fail as a matter of law.

Neither can Plaintiffs carry their burden of showing that all applications of the witness requirement are unconstitutional during the pandemic, even if the analysis is limited to those who do not live with another adult. Indeed, as explained below, each of the individual voters deposed who allege they live alone and are concerned about complying with the witness requirement admitted to one or more of the following: (1) having regular contact with other individuals outside their home since March 2020, (2) having someone they could ask to witness their ballot, or (3) even having already made arrangements for a witness. *See infra* Part III.E.1.vi.c. And presumably these voters were chosen to participate in this lawsuit because they are isolating themselves more than the typical voter. Plaintiffs make no effort to establish the number of voters who live alone but nonetheless would have essentially zero burden to comply with the witness requirement, such as those who attend a physical school, go to a workplace, or frequently visit with family and friends. The witness requirement cannot possibly be unconstitutional in these applications. As for the necessity of paying postage to mail a completed ballot, it simply cannot be maintained with a straight face that having to purchase a single 55-cent stamp unconstitutionally burdens the right to vote of every absentee voter in the State. Nor do Plaintiffs provide any credible explanation supporting the notion that every voter who chooses to vote by mail will face difficulty returning their ballot in time. And Plaintiffs fail to establish that the prohibition on ballot harvesting unconstitutionally burdens all absentee voters, as many North Carolinians will not be burdened in the slightest by the ban.

As Justice Stevens explained in his controlling opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), *see Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1222 n.31 (11th Cir. 2020), even if a "neutral, nondiscriminatory regulation of voting procedure" creates "an unjustified burden on *some voters*," the "proper remedy" is not "to invalidate the entire statute," *Crawford*, 553 U.S. at 203 (controlling opinion of Stevens, J.) (emphasis added). But the kind of improper remedy condemned by Justice Stevens in *Crawford* is precisely what Plaintiffs seek here. *Id.* at 202 (internal quotation marks omitted). Plaintiffs' challenges thus are doomed to fail.

ii. Plaintiffs' Challenges Violate the *Purcell* Principle

The U.S. Supreme Court, invoking its decision in *Purcell v. Gonzalez*, "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. 1207. That is because "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). For example, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that will increase "[a]s an election draws closer." *Purcell v. Gonzalez*, 549 U.S 1, 4–5 (2006) (per curiam).

Even if Plaintiffs are correct that the challenged provisions violate the State Constitution, this Court should abstain from entering the proposed consent judgment, thereby disrupting the State's upcoming elections. "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds*, 377 U.S. at 585. Here, equity favors judicial modesty.

In recent months, other courts faced with election-law challenges prompted by the COVID-19 pandemic have followed the Supreme Court's lead in *Republican National Committee* and have recognized the need to avoid changing "state election rules as elections approach." *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). And they have exercised caution under *Purcell* even though "the November election itself may be months away," *Thompson*, 959 F.3d at 813, because states cannot reasonably be expected to dramatically alter their election procedures overnight; they need sufficient time to coordinate and plan the logistics of any election-related changes.

The reasons animating the *Purcell* principle apply with full force here. First, should the Court enter the proposed consent decree, it would create a "conflicting court order[]" with recent federal court and state court decisions to uphold the very same provisions against similar federal and state constitutional challenges. *See* Order on Injunctive Relief, *Chambers* (rejecting motion to enjoin witness requirement); *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103, *136–45 (rejecting motion to enjoin the witness requirement and require contactless drop boxes). Second, the November election is merely six weeks away, and "important, interim deadlines that affect Plaintiffs . . . and the State" have already passed. *Thompson*, 959 F.3d at 813. In particular, absentee ballots were made available to voters on September 4, *see* N.C. GEN. STAT. § 163-227.10(a), and as of September 29, 2020, nearly 1.1 million absentee ballots have been requested and over 275,000 voters have already cast their absentee ballots.[7] Moreover, counties have already set their one-stop early voting schedules.[8] If the Court were to enter the proposed consent judgment and change the challenged provisions now—when hundreds of thousands of absentee ballots have

[7] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

[8] *See Vote Early In-Person*, N.C. STATE BD. OF ELECTIONS (Sept. 21, 2020), https://www.ncsbe.gov/voting/vote-early-person.

already been sent to voters and early voting schedules have already been set and disseminated—the Court's order would surely cause massive confusion and consume administrative resources because to implement the order the NCSBE and county boards would have to embark on a public education campaign that would inform voters that the instructions on the ballot envelopes must be disregarded and that the previously stated requirements and receipt deadlines are incorrect. What is more, this Court's order itself would be subject to immediate appellate review which, absent a stay, could lead to a reversion back to the original rules in the days or weeks to come.

In short, whatever the merits of Plaintiffs' legal claims, they have put this Court in an untenable position because the proposed consent judgment they seek is entirely impractical—indeed, affirmatively harmful—because of the proximity to the November election. Under the logic of *Purcell*, this reason alone should be sufficient to deny their motion.

iii. Plaintiffs Failed to Exercise Appropriate Dispatch in Raising Their Challenges

"Equity demands that those who would challenge the legal sufficiency of [legislative] decisions concerning time sensitive public [decisions] do so with haste and dispatch" in particular. *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989); *see also North Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009) (affirming denial of injunction when "some two months elapsed without any contention by plaintiffs of an urgent threat of irreparable harm") (brackets deleted). Here, Plaintiffs did not file their initial complaint until August 10, 2020—nearly five months after the NCSBE's Executive Director raised the potential need for legislative reform to address the impact of the pandemic on the State's elections (including specifically the witness requirement, prepaid return postage for completed absentee ballots, and early voting restrictions) and nearly two months after HB1169 was enacted. Worse still, Plaintiffs did not file their motion for entry of the proposed consent

decree until September 22—over a month after they initiated suit. Indeed, "Plaintiffs have in some respects created the need for the emergency relief" by "wait[ing] more than three months to file this action." *Kishore v. Whitmer*, No. 20-1661, 2020 U.S. App. LEXIS 26827, at *11 (6th Cir. Aug. 24, 2020); *see also Little v. Reclaim Idaho*, No. 20A18, 2020 U.S. LEXIS 3585, at *5 (U.S. July 30, 2020) (Roberts, C.J., joined by Alito, Gorsuch, Kavanaugh, JJ., concurring in the grant of stay) (faulting a party seeking emergency injunctive relief against a state's election law for "delay[ing] unnecessarily its pursuit of relief" (internal quotation marks omitted)).

Plaintiffs could have easily challenged the various election policies and requirements at issue before August 10. The provisions existed—some of them in a more restrictive form—long before the pandemic began. And even after the pandemic hit the State, Plaintiffs clearly delayed in filing their complaint. Contrast their suit with the similar federal challenge in *Democracy North Carolina v. North Carolina State Board of Elections*. There, the plaintiffs filed their complaint on May 22, 2020, *see Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *11, nearly three months before Plaintiffs here, and moved for a preliminary injunction on June 5, 2020—three months before the September 4 deadline for releasing absentee ballots. Plaintiffs also are represented by the same counsel that represent the plaintiffs in the *Stringer* case, which raises similar claims but was filed in May (although they have delayed in moving the case forward since then). Plaintiffs here had no legitimate reason for not acting sooner than they have.

And although Plaintiffs had ample opportunity to file for relief at an earlier date, their delay now risks putting the State in an untenable situation. If the Court enters the proposed consent decree now, the State will have to expend significant administrative resources informing voters of the new election procedures, likely causing massive confusion. This Court should not reward Plaintiffs' delay with a consent judgment.

iv. Plaintiffs' Challenges Second-Guessing State Officials' Responses to the Pandemic Are Not Appropriate

"Under the Constitution, state and local governments . . . have the primary responsibility for addressing COVID-19 matters such as . . . adjustment of voting and election procedures . . . ." *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 U.S. LEXIS 3584, at *29–30 (U.S. July 24, 2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief). As the passage of HB1169 demonstrates, North Carolina legislators and election officials have acted to adapt the State's election laws to account for the COVID-19 pandemic. Moreover, these elected officials are far better positioned than a court to assess the balance of benefits and harms that are likely to result from altering the State's election regulations in the final months before a general election. Indeed, such assessments require officials "to act in areas fraught with medical and scientific uncertainties," where "their latitude must be especially broad," and not "subject to second-guessing by" judges who "lack[] the background, competence, and expertise to assess public health." *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (internal quotation marks omitted). North Carolina officials have not been sitting idly by; they are actively and diligently seeking to accommodate both the State's interests and their voters' interests, all while reacting to the ever-changing effects of COVID-19 on daily life.

The COVID-19 pandemic has not given judges "a roving commission to rewrite state election codes." *Tex. Democratic Party*, 961 F.3d at 394. For this reason, the Supreme Court has shown enormous deference to State election officials during the COVID-19 pandemic. The Court on several occasions during the pandemic has refused to vacate courts of appeals' stays of lower-court preliminary injunctions affecting elections. *See*, *e.g.*, *id.* at 412 (staying injunction against Texas absentee ballot restrictions), *application to vacate stay denied*, 140 S. Ct. 2015 (2020) (mem.); *Thompson*, 959 F.3d 804 (staying injunction against Ohio initiative signature

requirements), *application to vacate stay denied*, No. 19A1054, 2020 U.S. LEXIS 3376 (U.S. June 25, 2020) (mem.). And it has on even more occasions *granted* stays of lower-court preliminary injunctions that have attempted to change electoral rules in light of the pandemic. *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. 1205 (staying injunction against requirement that absentee ballots be postmarked by election day); *Little*, 2020 U.S. LEXIS 3585; *Clarno v. People Not Politicians Or.*, No. 20A21, 2020 U.S. LEXIS 3631 (U.S. Aug. 11, 2020) (mem.) (staying injunction against initiative signature requirement); *Merrill v. People First of Ala.*, No. 19A1063, 2020 U.S. LEXIS 3541 (U.S. July 2, 2020) (mem.) (staying injunction against absentee ballot witness requirement).

Of particular note is the Supreme Court's ruling in *Merrill*, where the district court enjoined Alabama from enforcing its two-witness requirement for absentee voters to all voters "who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the Centers for Disease Control has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19." *People First of Ala. v. Merrill*, No. 20-cv-619, 2020 U.S. Dist. LEXIS 104444, at *86–87 (N.D. Ala. June 15, 2020). The Eleventh Circuit refused to stay that injunction pending Alabama's appeal, *see People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 505 (11th Cir. 2020), but the Supreme Court stepped in to halt the injunction. And importantly, that injunction was not the kind of blanket prohibition requested by Plaintiffs here. If the Supreme Court concluded that *Merrill*'s comparatively modest injunction was not justified by the pandemic, it is hard to see how an appellate court could find Plaintiffs' proposed consent judgment any more justifiable.

v. Plaintiffs' Challenges Related to Absentee Voting Are All Subject to Rational-Basis Review

All of Plaintiffs' claims challenge aspects of absentee voting—whether limitations on one-stop early voting (a form of absentee voting) or absentee voting by mail. Plaintiffs assert that the challenged provisions "unconstitutionally burden the right to vote" because they violate the North Carolina Constitution's guarantees of the freedom of assembly, the freedom of speech, and equal protection. Pls.' Mem. at 30; *see also* N.C. CONST. art. I, §§ 12, 14, 19. In assessing the merit of this claim, the Court must first ascertain the proper level of scrutiny for reviewing the election policies and requirements at issue. Plaintiffs contend that "[b]ecause [their] claims implicate the fundamental right to vote on equal terms, and the challenged provisions burden constitutionally-protected speech and political association, strict scrutiny applies." Pls.' Mem. at 31. This assertion is meritless.

The view that *all* restrictions on the right to vote are subject to strict scrutiny is plainly foreclosed by precedent. *See Burdick v. Takushi*, 504 U.S. 428, 432 (1992) ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."). In *Libertarian Party of North Carolina v. State*, 365 N.C. 41 (2011), the North Carolina Supreme Court—following the United States Supreme Court's lead—explained that "requiring 'every voting, ballot, and campaign regulation' to meet strict scrutiny 'would tie the hands of States seeking to assure that elections are operated equitably and efficiently,'" *id.* at 50 (quoting *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring)). "Hence, strict scrutiny is warranted only when [the] right [asserted] is *severely burdened*." *Id.* (emphasis added).

Having established that strict scrutiny cannot be reflexively applied in the electoral context, the question remains of how to assess the constitutionality of the challenged provisions. Although

Plaintiffs do not even consider the possibility that rational-basis review may apply to their vote-burdening claims, a careful review of the case law reveals that to be the case.

For starters, it is well established that "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Burdick*, 504 U.S. at 433 (explaining that the right to vote does not entail an absolute right to vote in any particular manner); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *O'Brien v. Skinner*, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting) ("The State, after all, as a matter of constitutional requirement, need not have provided for any absentee registration or absentee voting.").

Indeed, although the North Carolina Supreme Court long ago held that the North Carolina Constitution does not *preclude* the General Assembly from permitting absentee voting, *see Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 349 (1920), no court in this State has ever held that the North Carolina Constitution *requires* the option of absentee voting. And because there is no constitutional right to cast an absentee ballot, burdens imposed on one's ability to vote absentee are reviewed under heightened scrutiny only in narrowly confined circumstances.

On this score, the Supreme Court's decision in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), is instructive. *See Libertarian Party of N.C.*, 365 N.C. at 47–53 (adopting the United States Supreme Court's construction of the Federal Constitution for evaluating state constitutional challenges to election law); *see also State v. Packingham*, 368 N.C. 380, 383 (2015) ("[W]hen analyzing alleged violations of our State Constitution's Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court."), *rev'd on other grounds*, 137 S. Ct. 1730

(2017); *State v. Hicks*, 333 N.C. 467, 484 (1993) ("We . . . give great weight to decisions of the Supreme Court of the United States interpreting provisions of the Constitution which are parallel to provisions of the State Constitution to be construed.").

In *McDonald*, the Court held that an Illinois statute that denied certain inmates absentee ballots did not restrict their right to vote. 394 U.S. at 807. In Illinois, unlike North Carolina, absentee balloting had been made "available [only] to four classes of person," such as those absent from their precinct and the disabled. *Id.* at 803–04. Because incarcerated persons were not among the limited classes, the plaintiffs' applications "were refused." *Id.* at 804. Applying an equal-protection framework, the Supreme Court held that so long as Illinois gave at least one alternative means of voting to the prisoners, the "Illinois statutory scheme" would not "impact" the inmates' "ability to exercise the fundamental right to vote." *Id.* at 807. The Court further explained that restrictions on absentee ballots are reviewed only for rationality unless the putative voter is "in fact *absolutely prohibited* from voting by the State" when looking at the state's election code "as a whole." *Id.* at 807–08 & n.7 (emphasis added). That is because there is a fundamental difference between "a statute which ma[kes] casting a ballot easier for some who were unable to come to the polls" and a "statute absolutely prohibit[ing]" someone "from exercising the franchise." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Goosby v. Osser*, 409 U.S. 512, 521–22 (1973) (striking down an absentee ballot restriction only because the state's statutory scheme "absolutely prohibit[ed]" incarcerated prisoners from voting by other means).

Earlier this year, the Fifth Circuit relied on *McDonald* and its progeny to reaffirm that state regulations of absentee ballots should be examined under rational basis review. In *Texas Democratic Party v. Abbott*, a motions panel of the Fifth Circuit determined that challenges to Texas's statutory scheme were unlikely to succeed on the merits even though Texas provides

absentee ballots only to a few limited classes of voters such as those over the age of 65 or those suffering from disabilities. 961 F.3d at 407. The court explained that in *McDonald*, the Supreme Court held that where a state statute "burden[s] only [an] asserted right to an absentee ballot," it is subject only to rational-basis review unless the plaintiff can produce "evidence that the state would not provide them another way to vote." *Id.* at 403. And as the Fifth Circuit further explained, although COVID-19 "increases the risks of interacting in public," under *McDonald*, state laws limiting access to absentee ballots do not violate the Constitution unless the State itself has "'in fact absolutely prohibited' the plaintiff from voting" and COVID-19 is "beyond the state's control." *Id.* at 404–05 (quoting *McDonald*, 394 U.S. at 808 n.7); *see also Thompson*, 959 F.3d at 810 (emphasizing that courts "cannot hold private decisions to stay home for their own safety against the State"). North Carolina "permits the plaintiffs to vote in person; that is the exact opposite of absolutely prohibiting them from doing so." *Tex. Democratic Party*, 961 F.3d at 404 (internal quotation marks and brackets omitted).[9]

Therefore, "*McDonald* directs [this Court] to review [North Carolina absentee-ballot laws] only for a rational basis." *Id.* at 406. That review demands only that the challenged provisions "bear some rational relationship to a legitimate state end." *Id.* Under this general standard, the Fifth Circuit found that Texas's restrictions on absentee voting were rationally related to the State's interest in deterring voter fraud and preserving efficient, orderly election administration. *See id.* at 406–08.

[9] Although the later merits panel in *Texas Democratic Party* was "hesitant to hold that *McDonald*" applied to plaintiffs' claims challenging Texas's regulations of absentee ballots, it nonetheless made "clear" that it was "not stating, even as *dicta*, that rational basis scrutiny is incorrect." *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 U.S. App. LEXIS 28799, at *54 (5th Cir. Sept. 10, 2020). The original opinion therefore remains persuasive and has not been repudiated.

If Texas's absentee balloting regime satisfies rational-basis review, then North Carolina's far less restrictive regime is necessarily constitutional. *Any* North Carolinian eligible to vote at the polls is eligible to vote by absentee ballot; the State does not restrict absentee voting to only certain classes of voters. And in North Carolina, any prospective voter can obtain an absentee ballot and the State has provided trained personnel to safely serve as witnesses for voters who require them. *See* N.C. GEN. STAT. §§ 163-226(a), 163-226.3(c). Under the rational-basis standard, the challenged provisions come to this Court "bearing a strong presumption of validity," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and the Court must uphold it against constitutional challenge so long as it "can *envision* some rational basis for the classification." *Huntington Props., LLC v. Currituck County*, 153 N.C. App. 218, 231 (2002). And the burden here is not on the State to prove that the challenged provisions are constitutionally permissible but "on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). Plaintiffs do not and cannot come close to clearing this hurdle.

The State's "interest in ensuring orderly, fair, and efficient procedures of the election of public officials" is plainly legitimate. *Pisano v. Strach*, 743 F.3d 927, 937 (4th Cir. 2014). The absentee ballot receipt deadline, dates and times for one-stop early voting, and allocation of postage expenses to the voter are bread-and-butter administrative measures of the sort necessary to conduct an election in an orderly and efficient manner. And the witness requirement and the ballot harvesting ban are rational means of promoting the State's interest in deterring, detecting, and punishing voter fraud and in ensuring confidence in the integrity of elections, for when a voter comes to the poll, he or she must provide identifying information in the presence of elections officials, but when would-be voters fill out a ballot remotely, there is no such check. This increases

the risk of ineligible and fraudulent voting. *See, e.g.*, Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. And as the *Democracy N.C.* court pointed out, this potential for abuse has been a reality in North Carolina, particularly in the recently discovered "Dowless scandal," which took place over the course of the 2016 and 2018 elections and threatened the integrity of state and federal elections. That scandal also put into stark relief the risk that absentee balloting may present. That is also probably why a dozen States have adopted witness requirements of some form. *See VOPP: Table 14: How States Verify Voted Absentee Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2020), https://bit.ly/33LAqay. The challenged provisions are a rational means for ensuring that the absentee ballot was filled out by the person under whose name the vote will be counted. That is enough to satisfy rational-basis review.

vi. If the *Anderson-Burdick* Balancing Framework Applies, the Challenged Provisions Are Constitutional

Even if Plaintiffs' challenge to the various election policies and requirements at issue were not subject to rational-basis review, the highest level of constitutional scrutiny Plaintiffs' claims could even conceivably merit is the standard known as the *Anderson-Burdick* analysis, which is taken from the United States Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and their progeny. The North Carolina Supreme Court, considering a ballot-access challenge, explicitly adopted the *Anderson-Burdick* framework to govern voting-rights challenges under the State constitution's equal protection, speech, election, and assembly clauses. *See Libertarian Party of N.C.*, 365 N.C. at 42; *see also James v. Bartlett*, 359 N.C. 260, 270 (2005).

This approach recognizes that "[i]n the interest of fairness and honesty, the State "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce

election- and campaign-related disorder," and accordingly that "requiring every voting, ballot, and campaign regulation to meet strict scrutiny would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Libertarian Party of N.C.*, 365 N.C. at 49–50 (internal quotation marks omitted). Thus, under *Anderson-Burdick*, "requirements constituting an unreasonable, discriminatory burden are the only requirements subject to strict scrutiny review." *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000); *see also Mays*, 951 F.3d at 786 (strict scrutiny is applicable only when "the State totally denie[s] the electoral franchise to a particular class of residents, and there [i]s no way in which the members of that class could have made themselves eligible to vote"). For "reasonable and nondiscriminatory rules," the court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (internal quotation marks and brackets omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate, empirical verification." *Id.* (internal quotation marks omitted). Once the State's interests have been articulated, that is the end of the matter; there is no further analysis of "the extent to which the state's interests make it necessary to burden the plaintiff's rights." *Wood*, 207 F.3d at 716.

Under this framework, then, the first question is whether any of the measures Plaintiffs have challenged "severely burden" the right to vote. *Id.* None do.

a. Postage Expenses

The requirement that voters bear their own postage—a single, 55-cent stamp—when choosing to return their completed ballot by mail is self-evidently a "reasonable, nondiscriminatory restriction[]." *Id.* (internal quotation marks omitted). The vast majority of states nationwide expect absentee voters to bear this minor, incidental expense. *See VOPP: Table 12: States with Postage-Paid Election Mail*, NAT'L CONF. OF STATE LEGISLATURES (2020), https://bit.ly/3hSTFDm; Expert

Affidavit of Dr. M.V. Hood, III, Ph.D. ("Hood Aff.") ¶¶ 38–39 (attached as Ex. 9 to Moss Aff.). While Legislative Defendants are acutely aware of the "devastating economic impact of the pandemic," Pls.' Mem. at 34, Plaintiffs' contention that purchasing a single 55-cent stamp imposes a "significant hurdle[] on North Carolinian's exercise of the franchise" is meritless, *id.* at 31. Indeed, in *Crawford* the U.S. Supreme Court found that Indiana's voter ID law failed to impose a severe burden on voting despite the fact that some voters may have been required to pay between $3 and $12 for a copy of their birth certificate in order to obtain a voter ID. *See* 553 U.S. at 199 n.17 (controlling opinion of Stevens, J.).

If the purchase of a 55-cent postage stamp constituted a severe burden on the right to vote, thereby triggering strict scrutiny, the same scrutiny would also have to be applied to the laws governing in-person voting in every single state. Any voter who lives more than a mile from the polling place will incur at least 55-cents in traveling expenses going to the polls, in either public transit costs or fuel and wear-and-tear. Indeed, Plaintiffs' expert Kenneth Mayer conceded that public transportation and gas costs for in person voters "probably" "are more than 55 cents per voter." Kenneth Mayer Expert Deposition Transcript ("Mayer Tr.") at 107:20–108:9 (attached as Ex. 10 to Moss Aff.). Yet no state reimburses voters for these incidental, *de minimis* expenses, and the courts have "routinely rejected" the notion that having to undergo "a long commute" to reach a polling place imposes "a significant harm to a constitutional right." *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1124 (N.D. Ga. 2020); *cf. Crawford*, 553 U.S. at 199 (controlling opinion of Stevens, J.) ("For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."); *Lee v. Va. State Bd. of Elections*, 843

F.3d 592, 601 (4th Cir. 2016) ("[E]very polling place will, by necessity, be located closer to some voters than to others.").

Courts have agreed that voters bearing their own postage expenses to submit their completed absentee ballots does not impose a severe burden on the right to vote, even in the context of the COVID-19 pandemic. In *DCCC v. Ziriax*, No. 20-cv-211, 2020 U.S. Dist. LEXIS 170427 (N.D. Okla. Sept. 17, 2020), the court found that postage "is a type of 'usual burden[] of voting,'" *id.* at *68 (quoting *Crawford*, 553 U.S. at 197–98), determined that "plaintiffs have not established that the lack of postage will result in disenfranchisement or an undue burden on any voter," and concluded that the burden the requirement imposed was "light," *id.* Furthermore, the court determined that the policy of the USPS "is to deliver the ballot, irrespective of whether it has postage or not." *Id.* (Plaintiffs' expert Mayer confirmed that the USPS's policy is to "deliver absentee ballots without a stamp," and therefore that "in theory, [it] should be true" that "no one in North Carolina will be disenfranchised because they failed to put a stamp on their absentee ballot return envelope." Mayer Tr. at 106:2–14.) The District Court for the Northern District of Georgia recently rejected a similar claim under *Anderson-Burdick* and did not find a constitutional violation. *New Ga. Project v. Raffensperger*, No. 20-cv-1986, 2020 U.S. Dist. LEXIS 159901, at *63 (N.D. Ga. Aug. 31, 2020).

What little discovery Legislative Defendants have been able to conduct in this case further undermines Plaintiffs' likelihood of success on the merits. With respect to concerns related to the delays in the postal service and lack of access to a stamp, each of the individual voters deposed who plan to vote absentee admitted at least one of the following: (1) they have a stamp, *see* Rebecca Johnson Deposition Transcript ("Johnson Tr.") at 28:14–17 (attached as Ex. 11 to Moss Aff.); Caren Rabinowitz Deposition Transcript ("Rabinowitz Tr.") at 32:24–25 (attached as Ex.

12 to Moss Aff.); and (2) they could ask for a stamp or regularly frequent places that sell stamps, *see* Susan Barker Fowler Deposition Transcript ("Fowler Tr.") at 24:15–17 (attached as Ex. 13 to Moss Aff.) (goes to grocery store); 24:18–19 (goes to drugstore); 24:22–23 (goes to gas stations); 25:20–22 (orders from Amazon); 32:13–15 (could ask parents for stamp).

b. Ballot Receipt Deadline

Likewise, Plaintiffs cannot plausibly claim that North Carolina's deadline for receipt of completed absentee ballots somehow "severely burden[s]" the right to vote. *Libertarian Party of N.C.*, 365 N.C. at 51. Obviously, the need to fairly and expeditiously count the ballots and determine the election results necessitates *some* deadline for submitting absentee ballots; and North Carolina's cutoff—which allows ballots postmarked before the end of election day to come in up to three days later—is more generous than most. *See* Hood Aff. at 13 fig.2. While Plaintiffs complain about anticipated postal delays, it simply cannot be realistically denied that North Carolina's deadline gives absentee voters "ample opportunity"—alleged USPS delays and all—to get their votes in on time, and it therefore does not "burden[] them in any meaningful way." *Pisano*, 743 F.3d at 934–35. All Plaintiffs have to do is mail in their ballots far enough in advance of election day to ensure they are received on time. Presumably, a week in advance of election day would be enough, as that would give their ballots more time to arrive than the relief they are seeking. That is precisely what the NCSBE is advising voters, both on its website and in the judicial voter guide sent to every household in the State. *See* Detailed Instructions for Voting by Mail, Returning a Ballot, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2E4ZxL7 (last accessed Sept. 29, 2020); Judicial Voter Guide 2020 at 14, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2EPP72k ("We strongly recommend mailing your completed ballot before October 27 for a timely delivery."). And this is leaving to the side the options of dropping off a ballot in person rather than

sending it through the mail (as the Plaintiffs Tom Kociemba and Rosalyn Kociemba have done), or voting in person, which, for those at heightened risk of complications from COVID-19 infection, can be done curbside without entering the polling place. *See* N.C. State Bd. of Elections, Numbered Memo 2020-20 (Sept. 1, 2020), https://bit.ly/32Onr5M.

Massachusetts' highest court recently rejected a similar challenge to that State's ballot receipt deadline. In line with the requirement in most states, the Massachusetts deadline at issue required all absentee ballots to be received before the end of election day itself—without North Carolina's extra three-day grace period. *See Grossman v. Sec'y of the Commonwealth*, 151 N.E.3d 429, 2020 Mass. LEXIS 510, at *1–2 (Mass. 2020).[10] The Massachusetts Supreme Judicial Court held that this deadline "does not significantly interfere with the constitutional right to vote," particularly given the obvious necessity of *some* "reasonable deadlines" and the fact that "voters, including those who have requested mail-in ballots, have multiple voting options, and thus are not limited to returning their ballots by mail." *Id.* at *3, *11. So too here. And notably, even when granting relief to plaintiffs challenging Pennsylvania's ballot receipt deadline, the Supreme Court of Pennsylvania extended that deadline from 8:00 p.m. on election day to 8:00 p.m. only three days after—essentially the same deadline that North Carolina currently has and a much shorter extension than the nine-day extension Plaintiffs request. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *89 (Pa. Sept. 17, 2020).

Deposition testimony confirms the lack of merit in Plaintiffs' claim. The one Plaintiff deposed thus far who had experience in the past with her absentee ballot being delayed in the mail

[10] *Grossman* considered a challenge to the Massachusetts deadline for receipt of absentee votes in the September 1 primary election: "before 8 P.M. on September 1." *Grossman*, 2020 Mass. LEXIS 510, at *2. Massachusetts' receipt deadline for the general election is the same as North Carolina's—a ballot is timely if it "is received not later than 5 P.M. on November 6, 2020," *i.e.*, three days after the election, "and mailed on or before November 3, 2020," as evidenced by a November 3 postmark. 2020 MASS. ACTS ch. 115, sec. 6(h)(3).

and who is advocating for extending the ballot receipt deadline admitted the problem was not with her prior ballot not getting back to her county board of election on time, but with her receiving her ballot in the first instance. *See* Fowler Tr. at 19:3–22. She admitted that none of the relief Plaintiffs are seeking would have addressed the problem she experienced in the past, and that she does not intend to wait until the last minute to mail her absentee ballot in this election, but instead to vote and return her ballot the day she gets it. *See id.* at 15:18–20; *cf.* Johnson Tr. at 36:18–24 (plans to mail ballot in September so it will be received before election); 36:25–37:2 (can use Ballottrax to make sure ballot arrives at the county board of election on time); Rabinowitz Tr. at 39:12–17 (agreed no reason she could not mail her ballot to be sure it got in before election day); 39:8–11 (can use Ballottrax to make sure ballot arrives on time).

c. Witness Requirement

North Carolina's absentee voting witness requirement—reduced, for the November 2020 election, to a single witness—likewise does not severely burden the right to vote. Even for those voters who live alone, asking a family member, friend, neighbor, or coworker to take a few minutes to observe that voter cast her vote and then write their name, address, and signature is hardly the type of "severe burden," *Libertarian Party of N.C.*, 365 N.C. at 50, that "totally denie[s]" the right to vote, *Mays*, 951 F.3d at 787.

That is so notwithstanding Plaintiffs' contentions that "interacting with individuals outside of one's household can pose the risk of contracting a highly contagious and dangerous virus." Pls.' Mem. at 33. Even voters who live alone and are social distancing from all other adults can satisfy the witness requirement while abiding by all relevant social-distancing and sanitization guidelines. For example, any family member, friend, neighbor, mail-delivery person, food-delivery person, or multipartisan assistance team ("MAT") member can watch the voter mark their ballot through a

window, glass door, or other barrier. At that point, the voter can pass the ballot under a closed door or through an open window to be marked, signed, and returned (after handwashing or sanitizing) without direct interaction between the two persons. These options are available to practically all voters living alone and would not require the voter or the witness to come within six feet of each other or break other social-distancing guidelines. By engaging in these sorts of protective activities, voters can vote without exposing themselves to any appreciable risk of contracting the virus. Indeed, the NCSBE has expressly advised voters on complying with the witness requirement in a safe manner.[11]

As the federal court for the Middle District of North Carolina recently found in rejecting a similar challenge to the State's witness requirement, "even high-risk voters can comply with the One-Witness Requirement in a relatively low-risk way, as long as they plan ahead and abide by all relevant precautionary measures, like social distancing, using hand sanitizer, and wearing a mask; in other words, the burden on voters is modest at most." *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *102; *see also DCCC*, 2020 U.S. Dist. LEXIS 170427, at *51–57. Once again, there is simply no realistic risk associated with having another adult witness the execution of an absentee ballot through a closed window, so long as the two parties use separate pens and the ballot itself is disinfected before it is passed between them. *See* Expert Affidavit of Philip S. Barie, M.D., M.B.A. ("Barie Aff.") ¶ 35 (attached as Ex. 14 to Moss Aff.).

Moreover, the witness requirement serves the important State interests of protecting the integrity of its elections, preventing fraud, and fostering confidence in the election process. The requirement is "especially important" during the pandemic because it helps "identify potential irregularities with absentee voting," which "takes place entirely out of the sight of election officials

[11] *FAQs: Voting by Mail in North Carolina in 2020*, N.C. STATE BD. OF ELECTIONS (Sept. 1, 2020), https://www.ncsbe.gov/voting/vote-mail/faqs-voting-mail-north-carolina-2020.

and is more susceptive to irregularity and fraud than other methods of voting." Strach Aff. ¶¶ 54–55. Accordingly, the witness requirement was pivotal in allowing the NCSBE to ferret out the patterns of fraudulent absentee ballots submitted as part of the Dowless scandal. *Id.* ¶ 59. Eliminating the requirement would divest the NCSBE and local county boards of elections of a "valuable tool[] [for] detecting and investigating irregularities and fraud." *Id.* ¶ 64.

Plaintiffs' deposition testimony does not help their claim. Each of the individual voters deposed who allege they live alone and are concerned about complying with the witness requirement admitted to one or more of the following: (1) having regular contact with other individuals outside their home since March 2020, *see* Johnson Tr. at 17:14–25; 19:4–15; 21:8–18; 22:10–20; 25:16–18; 26:13–19; 27:5–10 (spent weekend at cousin's lake house, gotten take-out numerous times, gotten haircuts and pedicures, sees her yard man weekly, has visited with a friend outdoors for over an hour, and drove a friend to have lunch at her club); Rabinowitz Tr. at 23:15; 26:7–18 (been to drug store, gotten haircut, been to doctors and took a ride share service to get there and back three times); (2) having someone they could ask to witness their ballot, *see* Johnson Tr. at 28:23–29:8; 36:3–9; Rabinowitz Tr. at 15:6–16; 19:5–15; 35:21–36:21; or (3) even having already made arrangements for a witness, *see* Johnson Tr. at 36:3–9 (stating that "a friend offered to come over – wanted hers witnessed, and we do each other's"). For those witnesses who do not live alone, they readily admitted they could have someone witness their ballots. *See* Fowler Tr. at 12:22–13:2; Jade Jurek Deposition Transcript ("Jurek Tr.") at 12:12–25 (attached as Ex. 15 to Moss Aff.); William Dworkin Deposition Transcript ("Dworkin Tr.") at 19:23–20:5 (attached as Ex. 16 to Moss Aff.).

d. Early Voting

Plaintiffs contend that "limitations on the number of days and hours of early voting that counties may offer burdens in-person voting." Pls.' Mem. at 36. They assert that the "pandemic will force counties to offer fewer total early voting locations than they would under normal circumstances, and the resulting fewer cumulative early voting hours will lead to larger crowds and long lines for those who attempt to vote in person." *Id.* These "crowded polling places" will force Plaintiffs to "risk[] their health in order to cast their votes." *Id.*

First, the data does not bear out Plaintiffs' dire predictions about polling place crowds. "[T]he number of early voting sites per count remains stable in 2020" as compared to 2016, and the "number of early voting hours and days offered in the 2020 general election represents a large increase over the prior two presidential election years." Expert Affidavit of Keegan Callanan, Ph.D. ("Callanan Aff.") ¶¶ 8, 10 (attached as Ex. 17 to Moss Aff.). Consequently, instead of leading to crowded polling places and long lines, this "significant increase in voting hours and days may logically be expected to reduce average waiting times at North Carolina's early voting sites." *Id.* ¶ 12. Moreover, "voter preference for in-person voting is expected to fall substantially in 2020 as compared to 2012 and 2016," *id.*—nearly 1.1 million absentee ballots have been requested as of September 29, 2020, compared with merely 106,051 requests 36 days before the 2016 election—logically entailing *less crowded* in-person polling places. *See also* Devore Aff. ¶¶ 4–10 (explaining efforts made to enlarge early voting sites and provide more opportunities to vote).

Second, neither does the data support Plaintiffs' claims about risks to health at in-person voting places. Plaintiffs cannot establish that polling places will not abide by necessary and appropriate social distancing and sanitizing protocols specifically designed to mitigate those risks.

See N.C. State Bd. of Elections, Numbered Memo 2020-18 at 2–3 (Aug. 14, 2020), https://bit.ly/3jp2kO9 (requiring election officials to implement such measures, including mandated social distancing, masks for all election workers, and frequent sanitizing of high-touch areas). Recent peer-reviewed research found that the April election in Wisconsin highlighted by Plaintiffs produced "no detectable spike" in COVID-19 infections and thus appears to have been "a low-risk activity."[12] Dr. Fauci, the nation's leading expert on infectious diseases, recently suggested that voting in person, in compliance with recognized social distancing and other protective measures, poses no greater risk of infection than going to the grocery store.[13] And again, any voter who suffers from an elevated risk of COVID-19-related complications is entitled to vote curbside, without ever leaving his or her car. *See* N.C. GEN. STAT. § 163-166.9; Numbered Memo 2020-20. Counties also are authorized to set up walk-up curbside voting areas for voters who do not arrive at the polling place in a vehicle. *See* Numbered Memo 2020-20 at 2.

That leaves Plaintiffs with nothing more than the allegation that there will be "inevitable crowds and long lines" at some polling places in November. Pls.' Mem. at 36. But while "having to wait in line may cause people to be inconvenienced," that minor inconvenience—experienced in *every* election by at least some voters who reside in populous areas—does not alone constitute a severe burden on the right to vote. *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004); *see also Gwinnett Cnty. NAACP*, 446 F. Supp. 3d at 1124 ("[W]hile the Court understands that a long commute or wait in line can be an inconvenience, courts have routinely rejected these factors as a significant harm to a constitutional right—particularly when there is no evidence of improper intent.").

[12] Kathy Leung et al., *No Detectable Surge in SARS-CoV-2 Transmission Attributable to the April 7, 2020 Wisconsin Election*, 110 AM. J. PUB. HEALTH 1169 (2020), https://bit.ly/3gKKWKr.

[13] Nsikan Akpan, *What Fauci Says the U.S. Really Needs To Reopen Safely*, NAT'L GEOGRAPHIC (Aug. 13, 2020), https:/on.natgeo.com/2EQZxhM.

The one Plaintiff deposed thus far who intends to vote in person and alleged concerns about inadequate opportunities to vote leading to long lines and crowds that would necessitate extending the early-voting period admitted that her regular polling place will be open, that in the past she has found times to vote that were not crowded, that she has no idea how the number of days or hours of early voting compare to prior elections, and that she can vote at times that will be less crowded such as during the day in the middle of the week. *See* Jurek Tr. at 23:8–22; 24:3–8; 25:13–23; 27:1–8; 28:1–7. Further undermining her claims, this Plaintiff admitted she could use curbside voting but that she did not want to. *Id.* at 20:22–21:16.

e. Ballot Harvesting Ban

Plaintiffs claim that they are injured by North Carolina's restrictions on third-party assistance with requesting absentee ballots and delivering completed ballots. Pls.' Mem. at 35–36. But, first, none of the Plaintiffs assert that they have been injured by the restrictions on assistance with requesting absentee ballots. Indeed, each of the Plaintiffs deposed thus far who intend to vote absentee admitted to having already requested their absentee ballots, *see* Johnson Tr. at 29:9–20; Rabinowitz Tr. at 16:13–21; Fowler Tr. at 13:3–10; Dworkin Tr. at 9:25–20:5. Thus, there is no evidence of a single Plaintiff who requires assistance from other individuals or organizations in completing and submitting their absentee ballot applications.

Second, although Ms. Johnson, Ms. Rabinowitz, and Rosalyn and Tom Kociemba assert that they are injured by the restrictions on who can deliver completed ballots, Pls.' Mem. at 35–36, they are unlikely to succeed on their challenge to the ballot harvesting ban. Rosalyn and Tom Kociemba, of course, have already voted, so this Court can provide them with no relief. With respect to the others, North Carolina law criminally prohibits anyone 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). But given that no criminal prosecutors are defendants in this case, the Court cannot provide relief from this criminal statute as regardless of what this Court does prosecutors will remain free to prosecute violations.

Plaintiffs' claims fail apart from these fatal defects. Plaintiffs insist that this ballot harvesting ban "erects another barrier to absentee voting" for voters without access to postage, voters who are concerned about their ballot being delivered by the USPS on time, voters who are concerned about the risks of in-person voting, voters without immediate family members available to assist them in submitting their ballots, and voters whose ballots arrive too late to return by mail. Pls.' Mem. at 35–36. But because the ballot harvesting ban is a "reasonable and nondiscriminatory" rule, this Court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va.*, 826 F.3d at 719 (internal quotation marks and brackets omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate empirical verification." *Id.* (internal quotation marks omitted).

The State has met its burden. The Dowless scandal exposed that absentee ballots are particularly susceptible to fraud. *See* Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. Indeed, Legislative Defendants' expert found evidence of at least 1,265 voters who voted in both North Carolina and another state in the 2016 general election—64% of whom cast an absentee ballot in North Carolina. Expert Report of Ken Block ¶ 38 (attached as Ex. 19 to Moss Aff.). In the aftermath of the Dowless scandal, the State reasonably and credibly determined that preventing abuse of the ballot collection process required targeted restrictions on handling completed absentee ballots by individuals outside of the voter's family and legal

guardians. The State plainly has a legitimate and important interest in preventing such election fraud from occurring again.

Moreover, with respect to restrictions on who can return an absentee ballot if the voter did not want to use the postal service, each of the individual voters deposed admitted to one or more of the following: (1) regularly leaving their home and being in situations that put them in contact with others for at least the length of time it would take to return their ballots to their county boards of election, *see* Johnson Tr. at 17:14–25; 19:4–15; 21:8–18; 22:10–20; 25:16–18; 26:13–19; 27:5–10 (spent weekend at cousin's lake house, gotten take-out numerous times, gotten haircuts and pedicures, sees her yard man weekly, has visited with a friend outdoors for over an hour, and drove a friend to have lunch at her club); Rabinowitz Tr. at 23:23–24:11 (spent half an hour getting a haircut); (2) having the ability to get to their respective county board by car, walking, or a ride-service, *see* Rabinowitz Tr. at 26:13–18 (has taken a Lyft several times since March 2020); or (3) having a near-relative who could return their ballot for them, *see* Fowler Tr. at 15:1–13, 18–24. William Dworkin, the President of the one organizational Plaintiff in the case, the North Carolina Alliance for Retired Americans, admitted under oath that his organization does not plan to offer assistance to voters in returning their ballots even if the relief Plaintiffs are seeking is granted. *See* Dworkin Tr. at 56:13–18.

* * *

Despite these decided weaknesses in Plaintiffs' claims that render them unlikely to succeed on the merits, there is no evidence that the weaknesses were ever explored by the NCSBE or that they informed the ultimate settlement analysis of either party. Moreover, the State has a compelling interest in deterring voter fraud and protecting election integrity, a theme that underlies the challenged election law provisions. The proposed consent judgment does not meaningfully analyze

these state interests either. The proposed consent judgment fails on the "most important factor"—likelihood of success on the merits—so this Court must reject it. *Flinn*, 528 F.2d at 1172.

2. The Relief Afforded by the Proposed Consent Judgment is Vastly Disproportionate to the Purported Harm

The proposed consent judgment is not fair, adequate, and reasonable for the second, independent basis that the relief it affords is vastly disproportionate to the purported harm. Indeed, in several respects the proposed consent judgment goes *beyond* the relief Plaintiffs are seeking. For example, the proposed consent judgment vitiates the witness requirement for *all* voters, not just those who reside without another adult. *See* Am. Compl. at 39. The proposed consent judgment extends the ballot receipt deadline for ballots sent by commercial carrier despite Plaintiffs limiting their claims to ballots sent through the USPS. *Id.* at 40. And despite Plaintiffs not even seeking to have contactless drop boxes implemented as relief in this case, *see* Am. Compl. at 38–41, and despite that request being denied by the *Democracy N.C.* court, *see* 2020 U.S. Dist. LEXIS 138492, at *128–29, the proposed consent judgment allows such drop boxes to be implemented statewide.

The District of Minnesota recently rejected a consent judgment because of overbreadth problems similar to those plaguing this one. There, the court found that the burdens on particular voters could not possibly support the State's "blanket refusal to enforce [Minnesota's] witness requirement." Fairness Hearing Tr. at 11–12, *League of Women Voters of Minn. Educ. Fund v. Simon*, No. 20-cv-1205 (D. Minn. June 23, 2020). As the court put it, "the consent decree is not substantively fair or reasonable because it would, if approved, impose relief that goes well beyond remedying the harm Plaintiffs allege to suffer in support of their as-applied challenge to Minnesota's witness requirement." *Id.* at 10. It is a well-settled principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Appeal of Barbour*, 112 N.C. App.

368, 373–74 (1993). Because the proposed consent judgment violates this principle, granting Plaintiffs relief that is vastly disproportionate to the purported harm they allege, the proposed consent judgment is not fair, adequate, and reasonable, and this Court must reject it.

F. This Court Must Not Enter the Proposed Consent Judgment Because It Is Against the Public Interest

Entering the proposed consent judgment would disserve the public interest in four ways.

First, the public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members and civil litigants.

Second, because the challenged election laws are constitutional, not entering the consent judgment "is where the public interest lies." *Tex. Democratic Party*, 961 F.3d at 412 (internal quotation marks omitted); *accord Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Courts should not "lightly tamper with election regulations," *Thompson*, 959 F.3d at 813, so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact," *id.* at 812; *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006); *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 904 (5th Cir. 2012). This is especially true in the context of an approaching election. *Thompson*, 959 F.3d at 813; *Respect Maine*, 622 F.3d at 16. And it remains true even though the NCSBE has chosen to capitulate to Plaintiffs' demands instead of defending its duly enacted election laws. Entering the unconstitutional consent judgment, therefore, would undermine the constitutional election laws.

Third, entering the proposed consent judgment will engender substantial confusion, among both voters and election officials, by changing the election rules after the election has already started. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (explaining that the Supreme Court "has repeatedly emphasized that lower . . . courts

should ordinarily not alter the election rules on the eve of an election"); *Purcell*, 549 U.S at 4–5. To date, voters have requested 1,095,327 absentee ballots and cast 275,144 absentee ballots.[14] These ballots require a witness signature on their face, so eliminating that requirement now would render the instructions on hundreds of thousands, if not over a million, absentee ballots inaccurate. The NCSBE itself admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and engender disparate treatment of voters in the ongoing election. *See* Reply Br. of the State Bd. Defs.-Appellants at 8, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9 ("The proximity to the election . . . make[s] it practically impossible for the State Board to fairly and effectively administer the November 2020 elections under the [challenged election law], particularly in light of the significant administrative and voter-outreach efforts that would be required to do so."); *id.* at 27–35 (discussing the difficulty of changing election procedures in close proximity to the election and acknowledging that late-stage changes "may engender increased confusion among voters and poll workers," *id.* at 34).

Fourth, entering the proposed consent judgment will undermine confidence in the election by eliminating safeguards that protect against ineligible and fraudulent voting and that protect vulnerable voters. *See* Affidavit of Kimberly Westbrook Strach ¶¶ 69, 72, 87 (attached as Ex. 20 to Moss Aff.). For example, eliminating the witness requirement that the General Assembly specifically insisted on retaining (in a relaxed form), could cause some to question the integrity of

[14] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

the election, particularly when the NCSBE also has barred signature matching for absentee ballots. Indeed, eliminating the witness requirement will create particularly acute risks vulnerable populations. The witness requirement "protects the most vulnerable voters," including nursing home residents and other vulnerable voters, against being taken advantage of by caregivers or other parties" by "provid[ing] assurances to family members that their loved ones were able to make their own vote choices" and were not victims of absentee ballot abuse. *Id.* ¶ 72.

The proposed consent judgment is thus against the public interest and must not be entered.

IV. Should the Court Grant the Joint Motion for Entry of a Consent Judgment, Legislative Defendants Request a Stay Pending Appeal

In the alternative, should this Court grant the Plaintiffs' and Executive Defendants' joint motion for entry of a consent judgment, Legislative Defendants request that this Court temporarily stay enforcement of the consent judgment pending appeal. This Court has broad authority to enter a stay to protect the rights of the litigants during the pendency of an appeal. *See, e.g.*, N.C. R. Civ. P. 62(d) (allowing the trial court to recognize a stay of execution on a judgment under certain statutes); N.C. R. App. P. 8(a) (allowing the trial court to stay execution or enforcement of an order or judgment pending appeal).

While the Court of Appeals has not articulated a specific test for granting a stay of the enforcement of a trial court's order pending resolution of an appeal, *see Vizant Techs., LLC v. YRC Worldwide Inc.*, No. 15 CVS 20654, 2019 NCBC LEXIS 16, at *12 (N.C. Super. Ct. Mar. 1, 2019) (unpublished), trial courts deciding whether to grant a stay have focused on the prejudice and irreparable harm to the moving party if a stay were not issued, *see, e.g.*, *Vizant*, 2019 NCBC LEXIS 16, at *12–13; *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, No. 14 CVS 711, 2014 NCBC LEXIS 35, at *7–8 (N.C. Super. Ct. July 31, 2014) (unpublished) (citing *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19 (1997); *Rutherford Elec. Membership*

Corp. v. Time Warner Ent. / Advance-Newhouse P'ship, No. 13 CVS 231, 2014 NCBC LEXIS 34, at *10–11 (N.C. Super. Ct. July 25, 2014) (unpublished). Indeed, the Court of Appeals has upheld a trial court's decision to stay enforcement of a judgment pending appeal where the movant's claims were not "wholly frivolous" and thus "[t]here was some likelihood that [movants] would have prevailed on appeal and thus have been irreparably injured." *Abbott v. Town of Highlands*, 52 N.C. App. 69, 79 (1981).

Here, Legislative Defendants will be prejudiced and irreparably injured if this Court does not grant a stay of the proposed consent judgment pending appeal. A stay is necessary to protect Legislative Defendants' interests in defending duly enacted state election laws, the integrity of the ongoing election, and North Carolinians voting rights. Furthermore, the proposed consent decree substantially alters the current election law framework that governs the ongoing election. The NCSBE itself has admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and engender disparate treatment of voters in the ongoing election. *See* Reply Br. of the State Bd. Defs.-Appellants at 8, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9 ("The proximity to the election . . . make[s] it practically impossible for the State Board to fairly and effectively administer the November 2020 elections under the [challenged election law], particularly in light of the significant administrative and voter-outreach efforts that would be required to do so."); *id.* at 27–35 (discussing the difficulty of

changing election procedures in close proximity to the election and acknowledging that late-stage changes "may engender increased confusion among voters and poll workers," *id.* at 34).

Consequently, if the Court grants the motion to enter the consent judgment, a stay of the enforcement of that judgment is necessary to preserve the status quo, prevent confusion, and preserve the appellate court's ability to afford Legislative Defendants relief. Absent a stay, the NCSBE and the county boards of elections will move toward implementing procedures and conducting voter education efforts for extending the absentee ballot receipt deadline to nine days after election day and allowing unmanned drop boxes for voters to deliver completed ballots, efforts that may confuse voters and election officials should Legislative Defendants prevail on appeal and restore the status quo.

Furthermore, if the Court is inclined to deny Legislative Defendants' request for a stay, then they will seek the same relief from the appellate courts in the form of a motion for temporary stay and petition for writ of supersedeas. *See* N.C. R. App. P. 8(a) ("After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a temporary stay and writ of supersedeas in accordance with Rule 23."); *see also* N.C. R. App. P. 23 (stating procedure for petitions for writs of supersedeas). Thus, at a minimum, the Court should grant the temporary stay to afford the appellate courts the opportunity to rule on the Legislative Defendants' request.

V. Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants,

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, and,

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., and NORTH CAROLINA REPUBLICAN PARTY,

Republican Committee Intervenor-Defendants.

DOCKET NO. 20-CVS-8881

REPUBLICAN COMMITTEES' OPPOSITION TO PLAINTIFFS' AND EXECUTIVE DEFENDANTS' MOTION FOR ENTRY OF CONSENT JUDGMENT

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INTRODUCTION

With a backroom deal announced only last week, Plaintiffs and the Executive Defendants attempt to circumvent the authority of the General Assembly to regulate elections and rewrite statutes recently upheld by two courts—the U.S. District Court for the Middle District of North Carolina and a three-judge Court sitting in Wake County Superior Court. They claim this action is justified by the pandemic, but the General Assembly, vested with authority over election laws by both the Constitution of the United States and the Constitution of the State of North Carolina, has already made adjustments to the election laws to address the pandemic. This illegitimate deal is a plain ploy by an Executive Branch agency working collusively with a partisan group to usurp power from the General Assembly.

More specifically, this deal fails to pass scrutiny for at least five reasons. *First*, the so-called Consent Judgment may be approved, if at all, only by a 3-judge court. The agreement purports to revise certain statutory provisions—such as the ballot receipt deadline and the witness requirement—for all voters in all circumstances. Indeed, as Plaintiffs concede, if approved the deal would resolve the claims not only in *NC Alliance* but also in *Stringer*, which all parties and this Court agree is a facial challenge. *Second*, even if properly before this Court, the purported consent judgment does not meet standards for approval. *Third*, if entered by the Court, the revised election procedures would eviscerate laws enacted by the General Assembly earlier this year, and thereby violate Article I, Section 4 of the U.S. Constitution, which grants exclusive authority to the General Assembly to regulate the time, place, and manner for elections in the state. *See* U.S. Const. art. I, § 4. *Fourth*, even if constitutional, the changes called for in the Consent Judgment exceed the limited statutory authority of the North Carolina State Board of Elections. *Finally*, the deal would cause substantial voter confusion and cause significant disruption to the orderly

administration of voting, which has been underway since September 4. With only five weeks remaining until Election Day, these material, late changes to voting rules will sow confusion among voters and election officials, extend casting and tabulation of votes well past any reasonable deadline, invite post-election controversy, and deprive North Carolina voters of the free, fair, and secure election to which they are entitled. For these reasons, the Republican Committees urge the Court to reject the motion.

BACKGROUND

A. North Carolina's Election Code and the BOE's Role in Administering Elections

Today, North Carolina offers its citizens 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 created the option for absentee voting in 1917,[1] 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 carefully structured to ensure that elections are not only accessible but fair, honest, and secure.

In the order they are available to voters, the first option to vote is by absentee ballot. *See generally* N.C.G.S. § 163 art. 20. The BOE purported to make material modifications to 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). In view of the consensus that mail-in ballots present a higher risk of fraud than

[1] *See Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 347 (1920).

ballots submitted in person,[2] 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 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.

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[2] 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. 1, 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. 2, 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. 1, 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).

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). But the General Assembly also instructed that 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 consistent with these restrictions, "upon recommendation of the Attorney General," the BOE can "enter into agreement with the courts in lieu of protracted litigation," but 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. § 163-27.1. These powers are similarly limited. To begin, these provisions apply only in exigent circumstances in

which the General Assembly has no opportunity to act. They do not give the BOE a chance to second guess the General Assembly after it has responded to an emergency, as the General Assembly has here. Moreover, 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). Thus, these statutory provisions cannot support the deal BOE reached in this case.

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. Taking full account of the COVID-19 pandemic and experiences of other states that had conducted primary elections during the pandemic, the General Assembly 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[3] and considered many proposals. The BOE advanced several proposals, including one to reduce or eliminate the witness requirement for absentee ballots. Leland Decl., Ex. 4, 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, and numerous contemporaneous articles recounting challenges faced by the United States Postal Service ("USPS"). *See generally* Leland Decl., Ex. 5, Jordan Fabian, "Trump's Postal Service Feud Risks Riling Voters with Price Hikes," *Bloomberg* (May 22, 2020); Leland Decl., Ex. 6, Nicholas Fandos & Reid J. Epstein, "A Fight Over the Future of the Mail Breaks Down Along Familiar Lines," *New York Times* (May 10, 2020).

[3] Leland Decl., Ex. 3, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3.

The General Assembly was also familiar with the recent election in North Carolina's Ninth Congressional District, which was so severely tainted by "absentee ballot fraud" that it had 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. 7, *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,[4] 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."[5] 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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[4] Leland Decl., Ex. 8, HB 1169, Voting Record.

[5] *See* Leland Decl., Ex. 3, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

These changes carefully balanced the public health concerns about the pandemic against the legitimate needs for election security. To achieve this balance, 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 Coordinated Litigation Effort To Subvert HB 1169 and Alter North Carolina's Election Procedures

The General Assembly's bipartisan action to assure North Carolina's general election will be safe, secure, and fair did not satisfy certain Democratic Party operatives, who saw in the COVID-19 pandemic a way to legislate through the courts. *E.g.*, Leland Decl., Ex. 9, Eric Holder: Here's How the Coronavirus Crisis Should Change U.S. Elections—For Good, TIME, at 4 (Apr. 14, 2020) ("Coronavirus gives us an opportunity to revamp our electoral system . . ."). Indeed, Plaintiffs' counsel in this case ventured that 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. 10, Marc Elias Tweet. In North Carolina alone, Democratic Party committees and related organizations have filed at least 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. Executive Director Bell testified by affidavit and in person, confirming the basis and reasonableness of the challenged restrictions. See p. 17, n. 11 below. 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 Democracy North Carolina v. The North Carolina State Board of Elections,* 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020). The court rejected nearly all the plaintiffs' 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 finding that even elderly, high-risk voters can fill out a ballot in a short period of time and have the witness observe the process from a safe distance, thereby significantly reducing or eliminating 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 discrete issues. First, the court held 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. It granted limited to relief to that voter. Second, the court held 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 on August 21, 2020 by issuing Numbered Memo 2020-19. Leland Decl., Ex. 11. The original Numbered Memo 2020-19 had two key parts: (1) it eliminated the requirement that county boards match the signature on the ballot to the voter's signature on file and (2) it defined a cure procedure 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. In contrast, affidavits could not be used to cure deficiencies related to the Witness Requirement—which the court had upheld—meaning the ballot would be spoiled, the voter notified, and the voter issued a new ballot. *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, Plaintiffs in this case and related organizations remained undeterred. They have continued to press forward with five other 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.[6] All of those lawsuits were filed against the BOE, and the Legislative Defendants were granted

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6 *See DSCC v. N.C. State Bd. of Elections*, No. 20-CVS-69947 (Sup. Ct. Wake Cnty. Sept. 8, 2020) (challenging Cure Process); *Chambers v. North Carolina*, Case No. 20-CVS-500124 (Sup. Ct. Wake Cnty. July 10, 2020) (Witness 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) (challenging 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) (challenging Uniform Hours requirement).

intervention in each case. In all of those lawsuits except *Chambers*, the Perkins Coie law firm, led by Partner Marc Elias, represented the plaintiffs against the BOE.

The second decision to address a motion to enjoin portions of HB 1169 was *Chambers*, which challenged the Witness Requirement. On September 3, a three-judge panel[7] denied the *Chambers* plaintiffs' motion to preliminarily enjoin the Witness Requirement. *See* Leland Decl., Ex. 12, *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 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. 13, *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 30, 1,116,696 absentee ballots had been requested, and 280,353 completed ballots had been returned.[8]

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[7] As discussed below (pp. 14-15), North Carolina law requires all challenges to the facial validity of North Carolina statutes to be heard by a three-judge panel in the Superior Court of Wake County. N.C.G.S. § 1A-1, 42.

[8] *See* https://www.ncsbe.gov/ for a current number of requested ballots; Leland Decl., Ex. 14, BOE Absentee Data.

Notwithstanding defeats in *Democracy North Carolina* and *Chambers*, and the approaching election, plaintiffs in the remaining cases continued to press on. In this case, plaintiffs 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.[9] The Republican Committees, who were awaiting a ruling on their intervention motion, also participated in those depositions.

D. 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. Those negotiations resulted in the plaintiffs' and BOE's agreement to the Consent Judgment, which they submitted to the court for approval on September 22. Not until September 22, after the negotiations were concluded, after execution of the deal, and when one of the plaintiffs' witnesses failed to show up for her deposition did the plaintiffs inform the Legislative Defendants and Republican Committees of the deal.

The proposed Consent Judgment would require plaintiffs 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. Although the hearing on the joint Consent Judgment motion is scheduled for October 2, it appears that the BOE has deemed its new "Numbered Memos" to be immediately effective, without awaiting this Court's approval.[10]

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[9] 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.

[10] BOE has purported to instruct county boards of election to begin immediate implementation of the revised version of Numbered Memo 2020-19. The Republican Committees, joined by others, and separately the Legislative Defendants, also joined by others, have sought injunctive relief against the Consent

Under the deal, the BOE implemented changes to North Carolina's election code by rewriting Numbered Memo 2020-19 (which established the Cure Process) and issuing three other 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 (i) lack of signature, (ii) problems with the voter's contact information, or (iii) problems with the witness's certification (for instance, the ballot had no witness or the witness failed to sign the ballot) by submitting a cure affidavit executed by the voter. *See* Leland Decl., Ex. 17, Revised Numbered Memo 2020-19. See also Leland Decl., Ex. 18 (redline comparison of original version of Numbered Memo 2020-19 to revised version).

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. 19, Numbered Memo 2020-22. In addition to *tripling* the Receipt Deadline from the statutory requirement of receipt *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.

Judgment in federal court. *See* Leland Aff., Ex. 15, *Wise, et al. v. N.C. State Bd. of Elections, et al.*, No. 5:20-cv-00505-M, Dkt. No. 1 (E.D.N.C. Sept. 26, 2020); Leland Aff., Ex. 16, *Moore, et al. v. Circosta, et al.*, No. 4:20-cv-00182-D, Dkt. No. 1 (E.D.N.C. Sept. 26, 2020).

20, Numbered Memo 2020-23. 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

When considering whether to grant a consent decree, "[t]he authority of a court to sign and enter a consent judgment ***depends upon the unqualified consent of the parties thereto***, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment." *Hill v. Hill*, 97 N.C. App. 499, 501 (1990); *see also Briar Metal Products, Inc. v. Smith*, 64 N.C. App. 173, 176 (1983) (same). In short, a failure of all parties to consent to a judgment, standing alone, precludes entry of the proposed judgment by the Court.

But even if (unlike here) *all* parties have consented, the Court must not blindly accept the terms of a proposed settlement. The Court must satisfy itself that "such settlement is made in good faith and free of fraud, collusion, or other vitiating element." *Weaver v. Hampton*, 204 N.C. 42, 167 S.E. 484, 485–86 (1933); *see also Medford v. Lynch*, 67 N.C. App. 543, 546, 313 S.E.2d 593, 595 (1984) (stating that a consent judgment is not a final judgment if there is evidence of collusion). And, of course, the proposed judgment must be consistent with the state and federal Constitutions, and within the authority of the agreeing parties.

ARGUMENT

Plaintiffs and Executive Defendants have not satisfied the fundamental requirements for entry of the Consent Judgement. Even if they had, entry of the Consent Judgment would be contrary to the laws duly enacted by the North Carolina General Assembly, exceed the authority of the Board to enter, and create confusion about the rules for administering the election while

votes are already being cast and tallied. For these reasons, the Republican Committees urge the Court to deny the Joint Motion.

I. THE CONSENT JUDGMENT IS NOT PROPERLY BEFORE THE COURT.

The Consent Judgment is not properly before this Court. Rather, the three-judge panel in *Stringer v. North Carolina State Board*, No. 20-CVS-5615 (Sup. Ct. Wake Cnty.) has jurisdiction over the Consent Judgment. This Court retained jurisdiction over the *North Carolina Alliance* case based on Plaintiffs' representation, joined by the State Defendants, that it is an "as applied" rather than a facial challenge. In contrast, the Court referred *Stringer* to a three-judge panel because all agreed *Stringer* is a facial challenge. But the Consent Judgment would order relief concerning *the entire North Carolina voting population, regardless of the particular circumstances of any individual voter,* by (1) extending the number of days for all 100 counties to receive all absentee ballot postmarked by election day from November 6 to November 12, (2) implementing new, state-wide procedures for "curing" any non-compliant absentee ballots, and (3) loosening restrictions throughout the state on who may deliver an absentee ballot to a voting location. This relief has broad public policy implications for all voters, and is far beyond the individual issues raised by the voters in *N.C. Alliance.* Indeed, the Plaintiffs and State explicitly state that the order "is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest." Consent Order Recital, p. 10.

Accordingly, the Consent Decree falls within the three-judge court statute. Any claim seeking an order to enjoin an act of the General Assembly on the basis that it is facially invalid because it violates the North Carolina Constitution or federal law *must* be transferred to a three-judge panel "if [] a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve *any issues* in the case" N.C. Gen. Stat. Ann. § 1-81.1(a1) (emphasis added). "A facial challenge is an attack on a statute itself as opposed to a particular

application." *Holdstock v. Duke Univ. Health Sys., Inc.*, 841 S.E.2d 307, 311 (N.C. Ct. App. 2020); *City of Los Angeles v. Patel*, 576 U.S. 409, __, 135 S. Ct. 2443, 2449, 192 L. Ed. 2d 435, 443 (2015)). It would be anomalous for this Court to approve, in a case asserting an "as applied" challenge, a purported Consent Judgment that provided "facial" relief.

In fact, the relief sought in the Consent Order closely resembles the relief requested by Plaintiffs in *Stringer v. North Carolina State Board*, No. 20-CVS-5615 (Sup. Ct. Wake Cnty.), a case transferred to a three-judge panel on September 22, 2020. *Compare* Stringer Complaint Prayer for Relief ("Requiring the State to extend the Receipt Deadline for ballots postmarked by Election Day") and Consent Order § VI.A ("For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots"). It is no wonder, then, that Plaintiffs' lawyers in *Stringer* (who also represent the *NC Alliance* Plaintiffs) have also withdrawn their motion for preliminary injunction in *Stringer*. Accordingly, only a three-judge Court has jurisdiction to review and approve the Consent Judgement.

II. EVEN IF PROPERLY BEFORE THIS COURT, THE PURPORTED CONSENT JUDGMENT DOES NOT MEET STANDARDS FOR APPROVAL.

There are at least three reasons why, even if this Court, and not the three-judge panel, did have jurisdiction, the Consent Judgment still does not met standards for approval.

First, , this court cannot consider a settlement agreement over the objections of other Defendants in the same case. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see also Hill*, 389 S.E.2d at 142 ("The authority of a court to sign and enter a consent judgment *depends upon the unqualified consent of the parties thereto*, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment.") (emphasis

added); *Briar Metal Prods.*, 64 N.C. App. at 176. The Legislative Defendants, representing the institutional interests of the General Assembly, as well as the Republican Committees, who were granted intervention while expressing objections to the deal, were excluded from negotiations leading to the Consent Judgment and alerted to the deal only *after* its submission to the Court. Indeed, the Republican Committees and Legislative Defendants learned of the settlement agreement for the first time on September 22 when one of the Plaintiffs failed to appear for her agreed deposition. *See* emails from Uzoma Nkwonta to Nicole Moss (Sept. 22-24, 2020) (attached as Leland Decl. Ex. 21). But as explicitly stated in the Consent Agreement, "extensive" and "substantial" negotiations between Plaintiffs and the Executive Defendants had been underway for weeks—indeed since the date Plaintiffs first filed their motion for a preliminary injunction in this case (on September 4), and *before* the Executive Defendants acquiesced in Plaintiffs' objection to transfer of this case to the three-judge court along with *Stringer*. By excluding the Legislative Defendants, who wrote and passed the laws in question and are the only parties in this lawsuit that have the power to revise or amend the General Statutes, and the Republican Committees, the Plaintiffs and Executive Defendants have entered and submitted an incomplete deal. This alone is a sufficient reason for the Court not to enter the Consent Judgment.

Second, as evidenced by the announcement of the deal to the Republican Committees and Legislative Defendants, the Consent Judgment is the product of collusion. *Medford*, 313 S.E.2d at 595 (stating that a consent judgment is not a final judgment if there is evidence of collusion); *see also Weaver*, 167 S.E. at 485–86 (1933) (stating that a court must satisfy itself that "such settlement is made in good faith and free of fraud, collusion, or other vitiating element."). The Executive Defendants had vigorously defended the General Assembly's laws in two previous

lawsuits, with Executive Director Bell testifying repeatedly against changes to the challenged provisions.[11]

And then, abandoning her sworn testimony, the Executive Defendants negotiated for weeks with Plaintiffs before striking an *ultra vires* backroom deal that completely cuts out the Legislative Defendants and the Republican Committees. The Consent Judgment and the Numbered Memoranda issued by the Board of Elections purport to rewrite the General Statutes—the exclusive prerogative of the General Assembly—in accordance with the policy preferences of Plaintiffs and their political allies. Indeed, the deal (encompassing both the Consent Judgment and the new and revised Numbered Memos that are part of it) adopts a number of provisions that the General Assembly actually *considered and rejected* earlier this year.

The Consent Judgment appears to be part of a nationwide strategy formulated by lawyers for the Democratic National Committee that have attempted to rewrite the election code of at least 22 states through at least 56 similar lawsuits. Each suit seeks to eliminate statutory protections against election fraud and extend the November 2020 election into mid-November or beyond. Highlighted on a website ironically named the "Democracy Docket," these cases are seldom litigated to conclusion—instead, plaintiffs cut backroom deals with friendly state election officials, exactly like this one.[12] Because the Consent Judgment bears several hallmarks of collusion, and

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[11] Executive Director Bell defended the Witness Requirement, testifying that it can "easily be accomplished" at a "safe and socially distant location." *See* Leland Aff., Ex. 22, Decl. of Karen Brinson Bell ¶ 19–22, *Chambers*. Executive Director Bell also defended the Assistance Ban. Leland Aff., Ex. 23, Trans. of Evid. Hearing Vol. 2, at 60:14–15, *Democracy NC*. She also testified against allowing voters to place their absentee ballots into "drop boxes" because a sufficient number of drop boxes do not exist, and there was not "sufficient time" to allow voters to use drop boxes for their ballots. Leland Aff., Ex. 24, Decl. of Karen Brinson Bell ¶ 35, *Democracy NC*.

[12] Plaintiffs and the Executive Defendants get no help from consent judgments recently entered with other states. Apart from being subject to different state statutes and judicial review standards than this deal, none of them drew an objection from a state party, whereas here the Legislative Intervenors in this case strongly oppose this deal in their capacities as a party to the litigation and as a co-equal branch of State Government. Moreover, in each of those other cases, the modifications to absentee voting provisions had been

appears to be the latest in a long line of similar collusive Consent Judgments, the Republican Committees urge this Court to reject it.

Third, even though the Joint Motion represents (p. 19, para VIII.G.) that "[t]his Stipulation and Consent Judgment is effective upon the date it is entered by the Court," the BOE is not waiting for this Court's approval. It has instructed county election boards to begin applying the standards in revised Numbered Memo 2020-19 immediately, including the provisions emasculating the Witness Requirement. Leland Decl. Ex. 25, Summa Aff. ¶¶ 3-5; *Id.*, Ex. A.

III. ENTRY OF THE CONSENT JUDGMENT WOULD INTRUDE ON THE GENERAL ASSEMBLY'S AUTHORITY 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. Neither North Carolina's "legislature" nor the United States Congress approved the deal. In fact, as described below at pp. 18-25, the deal purportedly adopts several changes to the law that the General Assembly ***expressly rejected*** this summer.

There is no question that the General Assembly is North Carolina's "Legislature." The North Carolina Constitution provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." N.C. Const. art. II, § 1. *See also Hawke v. Smith*, 253 U.S. 221, 227, 40 S. Ct. 495, 497, 64 L. Ed. 871 (1920) (noting the term "Legislature" in the U.S. Constitution refers to "the representative body

implemented during primary elections from June through August 2020, meaning that the relief had been implemented months prior to absentee voting in the general election. *See League of Women Voters of Va. v. Va. State Bd.*, ___ F. Supp. 3d ___, No. 6:20-cv-00024, 2020 WL 4927524, at *4 (W.D. Va. Aug. 21, 2020); *LaRose v. Simon*, No. 62-CV-20-3149, at *7 (Ramsey Cty. Dist. Ct. Aug. 3, 2020); *Common Cause R.I. v. Gorbea*, No. 20-cv-00318, 2020 WL 465608, at *4 (D. R.I. July 30, 2020). Here, in contrast, absentee voting for the general election is already underway.

[that] ma[es] the laws of the people."). It is also undisputable that the deal purports to alter the time, place, and manner for the November elections in North Carolina, Art I, Sec. 4, and the manner in which the state will appoint Electors for President, Art. II, sec. X. As explained in more detail below, the deal purports to: (1) effectively eliminate the statutory requirement that one person witness an absentee ballot ("Witness Requirement"), *compare* HB 1169 § 1.(a) with Leland Decl., Ex. 17, Revised Numbered Memo 2020-19 at 2; (2) extend the deadline for receipt of mailed-in ballots from *three days* after election day ("Receipt Deadline"), as plainly specified in the statute, to *nine days* after election day, *compare* N.C.G.S. § 163-231(b)(2) with Leland Decl., Ex. 19, Numbered Memo 2020-22 at 1; (3) eviscerate the statutory requirement that only mailed ballots postmarked by 5:00 p.m. on election day be counted ("Postmark Requirement"), *compare N*.C.G.S. § 163-231(b)(2) with Leland Decl., Ex. 19, Numbered Memo 2020-22 at 2; and (4) undermine restrictions on who can handle and return completed ballots ("Ballot Assistance" and "Ballot Delivery" bans), *compare* N.C.G.S. § 163-229(b); N.C.G.S. § 163-231(a)-(b); N.C.G.S. § 163-223.6(a)(5); HB 1169 §§ 1.(a), 2.(a) with Leland Decl., Ex. 20, Numbered Memo 2020-23 at 2-3. Courts have long rejected similar efforts to intrude upon the authority of state legislatures under the Elections Clause. *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887) (noting that any provision of the Rhode Island constitution that sought to "impose a restraint upon the [Rhode Island legislature's] power [to] prescribe[e] the manner of holding . . . elections [of representatives to Congress]" was void because the Elections Clause of the U.S. Constitution gives the power to the legislature, limited only by Congressional regulations); *State ex. rel. Beeson v. Marsh*, 34 N.W. 2d 279, 286-87 (Neb. 1948); *Com. Ex rel. Dummit v. O'Connell*, 181 S.W. 2d 691, 695 (Ky. Ct. App. 1944); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864). On these issues the Board is entitled to *no deference* under the United States Constitution.

Witness requirement. The BOE has gutted the critical Witness Requirement. In light of the pandemic, the General Assembly exercised its judgment to reduce, for the 2020 election, the requirement that two individuals witness a voter's absentee ballot to a one-witness requirement. HB 1169 § 1.(a). The BOE's Revised Numbered Memo 2020-19 goes further and would require a voter who submits an absentee ballot without a witness to be sent a certification for ***the voter to sign***, and then upon receipt of that *voter* certification (but still with no *witness*), instructs BOE to count the ballot. Leland Decl., Ex. 17, Revised Numbered Memo 2020-19 at 2. When drafting HB 1169, the General Assembly expressly considered and rejected the BOE's proposal to eliminate the witness requirement—although then (unlike now, in Revised Numbered Memo 2020-19) BOE proposed replacing the witness requirement with signature verification software. *See* Leland Decl., Ex. 28, State Bd. Apr. 22, 2020 Ltr. at 3; Leland Decl., Ex. 4, State Bd. Mar. 26, 2020 Ltr. at 3.

Again, it would be cynical for the Board to argue that the COVID-19 pandemic, as a health emergency, gives it the authority to eliminate this requirement. The General Assembly expressly considered—and indeed made—changes to the Witness Requirement to address the COVID-19 pandemic. The General Assembly has already addressed the emergency. And, as explained (pp. 7-11 above), two courts have already sustained the revised witness requirement against pandemic-related challenges. Thus, the BOE's backroom deal to eliminate the Witness Requirement entirely is not a response to any "emergency" requiring BOE action. Rather, BOE's deal is an *ultra vires* power grab that attempts to override the General Assembly's considered response to the pandemic. For that reason, the deal offends the Constitution and is not justified by the pandemic.

Receipt deadline. Similarly, the BOE's changes to the Receipt Deadline were also not for purposes of addressing the already-addressed emergency, and also 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 via 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. 19, 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 observed during primary elections in other states, any suggestion by the Board that this change was necessitated by those issues[13] would lack merit. The Consent Judgment 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. 28, *Alliance*, No. 20-CVS-8881, Stipulation and Consent Judgment, at **7-10. As shown, the General Assembly was well aware of mail issues encountered during Spring primaries conducted in other states, and made a prudent judgment not to extend the receipt deadline. Moreover, this provision relates to no "emergency" at all; it is wholly within each voter's control to avoid unnecessary delays by mailing

[13] Kenneth R. Mayer, 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. 27, Deposition of Kenneth R. Mayer at 80.) He also could not identify any instances in which 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.

a completed ballot with sufficient time for receipt, as over 200,000 North Carolinians already have done. Indeed, USPS and the BOE, among others, have already encouraged voters to request and return ballots as early as possible within the more than 60-day window before the receipt deadline. Leland Decl., Ex. 30, Plunkett Aff. at ¶ 28; *see also* N.C. Gen. Stat. § 163-227.10(a). Moreover, if a voter waits until the last day to return his or her completed ballot, he or she may return it in person. N.C.G.S. § 163-231(b)(1). The voter may also use "drive through" voting. N.C.G.S. § 163-166.9.

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 that ballot within the time parameters set by North Carolina voting statutes. Michael Plunkett, a recognized expert on the operations of the USPS, believes that USPS will be able to deliver absentee ballots in compliance with the statutory deadlines. Under the statutes, a ballot postmarked by Election Day can be received up to 3 days after Election Day. 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, "the increased volume of absentee ballot mail (estimated by plaintiffs as up to 2.3 million ballots) is infinitesimal compared to the normal volume of mail handled by USPS (twelve billion pieces of First-Class Mail in the third quarter of 2020), which has in any event fallen by over a billion pieces in the most recent quarter compared to the same period in 2019. *Id.* at ¶¶ 35-36. Accordingly, USPS's ability to deliver mail in a timely fashion will not be impacted by an increased volume of mail ballots. *Id*. at ¶¶ 33-35. Third, USPS has a plan for delivering election mail, and has established procedures and processes for the upcoming election. *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.

Finally, any attempt to justify the extension based on the UOCAVA deadline for military and overseas ballots would be misguided for two reasons. To begin, the General Assembly has long been aware of the different deadlines, and has elected not to standardize them. Moreover, military and overseas voters receive an extended deadline because of the unique difficulties – military personnel frequently change locations, and international mail takes longer to deliver than domestic mail—and that extension is intended to put them on par with domestic voters. Extending the deadline for domestic voters would again place military and overseas voters at a disadvantage. Leland Decl., Ex. 29, Lockerbie Aff. at ¶ 71.

Postmark requirement. The BOE's modification of 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). For remaining elections in 2020, however, 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).[14] The General Assembly has also refused to enact similar changes. Another bill, HB 1184, which the General Assembly did not adopt, included a similar proposal, among other items on the

[14] *See also* USPS processing guidelines, https://about.usps.com/handbooks/po408/ch1_003.htm.

Democrats' "wish list,"[15] and was not enacted.[16] HB 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, the terms of the deal intentionally override express judgments made by 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 will the Board deem sufficient to "indicate" when a ballot was 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 delivery 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]

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[15] Leland Decl., Ex 3, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

[16] *Id.*

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. 20, Numbered Memo 2020-23 at 2-3. This is not a change necessitated by COVID-19. Stamps are widely available, *see* Leland Decl., Ex. 30, Plunkett Aff. at ¶¶ 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. Under the BOE's deal, a county board of elections would be required to count ballots delivered as part of the Dowless scheme.

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.

IV. THE BOARD EXCEEDED ITS STATUTORY AUTHORITY TO ENTER THE DEAL WITH PLAINTIFFS.

Under its limited statutory authority, the State Board is not entitled to nullify or refuse to enforce North Carolina's election laws. The State Board has the power to exercise "general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable," with one significant caveat: those rules and regulations may "*not conflict with any provisions of this Chapter*." N.C.G.S. § 163-22(a) (emphasis added). Similarly, while the State Board has the authority "to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable," those rules must "not conflict with any provisions of this Chapter 163 of the General Statutes." *Id.* § 163-22.2. Indeed, the State Board has an affirmative obligation to follow and enforce North Carolina's election laws, as it "shall

compel observance of the requirements of the election laws by county boards of elections and other election officers." *Id.* § 163-22(c).[17]

As shown above, *see* pp. 18-24, the consent decree's provisions would override several critical components of North Carolina's absentee voting system. The Supreme Court of North Carolina has invalidated similar actions from the State Board that contravened North Carolina's election laws. In *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005), the Court reviewed whether the State Board acted lawfully by counting votes cast in a precinct other than the voter's precinct of residence in the final election tallies—despite North Carolina's requirement that "a voter is 'qualified to register and vote in the precinct in which he resides.'" *Id.* at 267, 607 S.E.2d at 642 (quoting N.C.G.S. § 163-55 (2003) (emphasis omitted)). The Court determined that the State Board exceeded its authority by violating the "plain language of the statute." *Id.* In so doing, the Court made clear that the State Board's actions not only violated its authority but further undermined the fundamental right to vote of those North Carolina citizens who voted lawfully:

> "[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). This Court is without power to rectify the Board's unilateral decision to instruct voters to cast provisional ballots in a manner not authorized by State law. *To permit unlawful votes to be counted along with lawful ballots in contested elections effectively "disenfranchises" those voters who cast legal ballots*, at least where the counting of unlawful votes determines an election's outcome. Mindful of these concerns, and attendant to our unique role as North Carolina's court of last resort, we cannot allow our reluctance to order the

[17] The State Board 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 "[a]n armed conflict." *See* N.C.G.S. § 16327.1(a). That statute is inapplicable here, as the COVID-19 pandemic would not fall under any of these three categories. Even if the pandemic fit the definition of an "emergency," however, the General Assembly has already addressed that emergency. It is inconceivable that the statute allows the Board, in the name of the very same "emergency," to ignore the General Assembly's response. Moreover, the emergency powers statute provides that "the Executive Director *shall* avoid unnecessary conflict with the provisions of this Chapter," *id.* § 163-27.1(a), and the State Board has provided no reason for thinking that overriding key provisions of North Carolina's election laws is necessary for responding to COVID-19.

> discounting of ballots to cause us to shirk our responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

James, 359 N.C. at 270, 607 S.E.2d at 644 (emphasis added). Indeed, the nullified precinct requirement served as a "protection against election fraud" and a means for "election officials to conduct elections in a timely and efficient manner," both of which were factors that provided further support for the Court's invalidation of the State Board's abuse of power. *Id.*

The same holds true here. The State Board's consent judgment aims to nullify some of the most significant components of North Carolina's electoral system only five weeks before the general election. This action threatens to cast the election into turmoil by increasing voter confusion, facilitating voter fraud, and undermining the public's confidence in the legitimacy of the electoral results. Both the North Carolina General Assembly and Supreme Court have made clear that the State Board of Elections is bound by North Carolina's election laws and lacks the authority to nullify those laws through unilateral administrative action. For this reason as well, the Consent Judgment is invalid.

V. THE LATE-HOUR CONSENT JUDGMENT WILL DISRUPT THE ORDERLY ADMINISTRATION OF THE NOVEMBER 2020 ELECTION.

The Consent Judgment fails for a final reason: the drastic changes Plaintiffs seek would lead to voter confusion and disrupt the administration of the general election only a month before Election Day and after 1,116,696 North Carolina voters have requested absentee ballots and 280,353 have already marked and returned their ballots.[18]

Under the well-established principle articulated in *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006), courts must consider how rulings issued just "weeks before an election" can lead to voter confusion, uncertainty, and related harms. In *Purcell*, the plaintiffs challenged

[18] *See* https://www.ncsbe.gov/ for current total.

Arizona's voter identification law that was in effect for a November 7 election. *Id.* at 2, 127 S. Ct. at 6. The district court denied the plaintiffs' request for a preliminary injunction, the plaintiffs appealed, and on October 5—just over a month before the election—the court of appeals granted a preliminary injunction pending appeal. *Id.* at 3, 127 S. Ct. at 7. The Supreme Court reversed, emphasizing how "[c]ourt orders affecting elections, especially conflicting orders, can . . . result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." *Id.* at 4–5, 127 S. Ct. at 7.

The Supreme Court has repeatedly applied the *Purcell* principle in election litigation. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553–54 (2018) (determining that the district court did not abuse its discretion in appointing a special master to redraw a challenged election map because doing so reduced the risk of the case's interfering with the election); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam) (affirming the district court's denial of a preliminary injunction to enjoin Maryland elections because "a due regard for the public interest in orderly elections supported [that] discretionary decision to deny a preliminary injunction and to stay the proceedings").[19] And the Court has continued to recognize that this principle applies even during the COVID-19 pandemic. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1205–07 (2020) (staying preliminary injunction requiring Wisconsin to count absentee ballots postmarked after election day, emphasizing that the injunction "contravened" the rule that courts "should ordinarily not alter the election rules on the eve of an election").

A recent Wisconsin federal district court decision illustrates how the *Purcell* principle applies even where, as here, the plaintiffs seek relief that would arguably expand their ability to

[19] *See also Riley v. Kennedy*, 553 U.S. 406, 426 (2008) ("[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.").

vote. In *Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2020 WL 5665475, *1 (W.D. Wis. Sept. 23, 2020), the plaintiffs challenged Wisconsin's restrictions on the use of certain forms of student identification for voting. The parties completed briefing on summary judgment motions on "September 22, 2020, only six weeks before the presidential election, [which was] well within the sensitive time frame" under *Purcell*. *Id.* Voting was already underway at that point, and the state election commission had "issued its Election Day Manual for municipal clerks, explaining the requirements for voting with a student ID as they [stood]." *Id.* In light of that short timeframe, the court denied the plaintiffs' request for relief. *Id.* at *2. It reasoned that "changing the status quo" would (1) leave the election commission "and municipal clerks with little time to issue new guidance and retrain staff"; (2) the "inevitable appeal" would create "weeks of uncertainty"; and (3) an order in favor of the plaintiffs could "lull student voters into complacency, believing that they now held an ID valid for voting, only to find out on the eve of the election that an appellate court had reached a different conclusion," thereby creating the "chaos and confusion that the *Purcell* principle is meant to avoid." *Id.* The court rejected the plaintiffs' argument that the *Purcell* principle does not apply "when voters rights would be vindicated by a change in the law," reasoning that the plaintiffs cited "no authority for that view," which was inconsistent with the Supreme Court's *Republican National Committee* decision where the Court "relied on the *Purcell* principle to reverse a decision extending the deadline for mailing absentee ballots." *Id.* (quotation marks omitted).

The *Purcell* principle similarly weighs in favor of rejecting the Consent Judgment. Even if this Court granted relief today, October 2, there would be only one month and one day until the election, which is well within the "sensitive timeframe" under *Purcell*. *Id.* at *1; *see also Purcell*, 549 U.S. at 3, 127 S. Ct. at 6 (applying principle where court of appeals granted injunction on

October 5, with election on November 7); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (collecting cases where Supreme Court stayed injunctions on voting requirements issued between 30 and 55 days before the election, and observing "the common thread" that these decisions "would change the rules of the election too soon before the election date"). The short timeframe is compounded by the fact that voting is already well underway, with over one million absentee ballots requested as of September 30 and 280,353 completed ballots already returned.

Given this short timeframe, the Consent Judgment would disrupt the voting process in a number of ways. As the Executive Defendants argued in prior cases, not only have absentee ballots begun going out with instructions on how to submit a valid ballot, but the "Judicial Voter Guide," with comprehensive instructions about voting generally, has been printed and is being mailed. Leland Decl., Ex. 22, Bell Aff. at ¶ 12. With conflicting instructions, the voter confusion feared in *Purcell* is a certainty. The Consent Judgment would also create a substantial risk of confusion and chaos for voters. To use an obvious example, the State Board would prohibit voters from using a drop box to submit ballots, but then nevertheless require county boards to count a ballot placed in a drop box. *See* Leland Decl. Ex. 20, Numbered Memo 2020-23 at 3. This new rule is self-contradictory and could confuse voters (not to mention administrators). The extension of the receipt deadline from three days after Election Day to nine days risks giving procrastinating voters another excuse to wait, and perhaps miss the postmark deadline, or even mislead voters if it turns out that the extension is overturned on appeal before Election Day. *See* Leland Decl. Ex. 19, Numbered Memo 2020-22; *cf. Thomsen*, 2020 WL 5665475, at *2 (noting this risk).

Finally, the aggregate impact of the Consent Judgment on election administrators would be material. Extension of the Receipt Deadline and elimination of the Postmark Requirement may prompt voters to delay submission of their votes until Election Day (or after), causing a flood of

last-minute ballots that could swamp election officials and risk lost or miscounted votes. Moreover, the changes procedures would confuse administrators, burden them with training on revised procedures, or both, interfering with their ability to perform their duties. For example, the State Board already issued a cure process to county boards on August 21. If this Court approves a revised process only six weeks later, county board officials and election workers would need additional training on the new cure process (and the other changes in the Board's memos), taking away precious time from handling and processing absentee ballots. Further, the new Memos contain numerous ambiguities. For instance, election workers would have to determine what "information" on a ballot tracking service is enough to "indicat[e]" that a ballot was in the custody of the USPS or another commercial carrier on or before Election Day. *See* Leland Decl. Ex. 19, Numbered Memo 2020-22. And if a ballot return envelope does not contain a postmark, the county boards must conduct "research" to trace the ballot—even though the State Board has not provided any guidance as to how much research to conduct, what sources to examine, and how long to spend on each ballot. *See id.* That is hardly a recipe for orderly, uniform election administration in which each ballot is considered on an equal basis.

The *Purcell* principle recognizes that last-minute changes to election laws can do more harm than good. *See Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots."). Here, the Consent Judgment's sweeping changes to North Carolina's election code threaten to sow confusion among administrators and voters, doubling the threat of chaos and disorder. As a result, the *Purcell* principle compels the rejection of the Consent Judgment.

In short, by sowing confusion among voters as to the applicable rules for completion and submission of ballots (for instance, whether it is permissible to drop a ballot in a dropbox), the Consent Judgment would interfere with the right of North Carolinians to cast their ballots with confidence that the election will be conducted fairly, kept secure, and counted accurately. The Consent Judgment must be rejected.

CONCLUSION

For these reasons, the Republican Committees respectfully urge this Court to deny Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

Respectfully submitted,

Dated: September 30, 2020

By: 

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**Admitted pro hac vice*

CERTIFICATE OF SERVICE

I certify that I have on this 30th day of September, 2020, served a copy of the foregoing by email and United States mail, postage prepaid, to counsel for the Plaintiffs, Defendants, and Intervenor-Defendants at the following addresses:

For the Plaintiffs: Marc E. Elias Uzoma N. Nkwonta Ariel B. Glickman Jyoti Jasrasaria Lalitha D. Madduri PERKINS COIE LLP 700 Thirteenth St., N.W., Suite 600 Washington, D.C. 20005-3960 Burton Craige-State Bar No. 9180 Narendra K. Ghosh-State Bar No. 37649 Paul E. Smith, State Bar No. 45014 PATTERSON HARKAVY LLP l 00 Europa Dr., Suite 420 Chapel Hill, N.C. 27517	For the Defendants: Alexander McC. Peters Paul M. Cox NORTH CAROLINA DEPARTMENT OF JUSTICE P.O. Box 629 Raleigh, N.C. 27602
	For Intervenor-Defendants: Nicole J. Moss-State Bar No. 31958 COOPER & KIRK, PLLC 1523 New Hampshire Avenue, N.W. Washington, D.C. 20036 Telephone: (202) 220-9600 Fax: (202) 220-9601 nmoss@cooperkirk.com Nathan Huff State Bar No. 40626 PHELPS DUNBAR LLP 4140 Park Lake Avenue, Suite 100 Raleigh, N.C. 27612 Telephone: (919) 789-5300 Fax: (919) 789-5301 nathan.huff@phelps.com

R. Scott Tobin

North Carolina Court of Appeals

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No. P20-513

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,

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,
AND

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC;AND NORTH CAROLINA REPUBLICAN PARTY

From Wake
(20CVS8881)

O R D E R

The following order was entered:

The 'Petition for Writ of Supersedeas and Motion for Temporary Stay' filed in this cause on 13 October 2020 by Philip E. Berger and Timothy K. Moore, in their respective official capacities as President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives, and the 'Renewed Petition for Writ of Supersedeas and Motion for Temporary Stay and Expedited Review' filed in this cause on 13 October 2020 by the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc, and the North Carolina Republican Party, are decided as follows: The petitions for writ of supersedeas are denied except for the purpose of directing the trial court to conduct any hearings it deems necessary and to issue any necessary orders to determine the scope of implementation of the order entered on 2 October 2020 by Judge G. Bryan Collins, Jr. in Wake County Superior Court in light of Numbered Memo 2020-19 and any orders entered by a federal court in any related matters. The temporary stay granted by this Court on 15 October 2020 is dissolved. The Motion for Expedited Review is dismissed without prejudice to re-filing once the appeal has been docketed in this Court.

By order of the Court this the 19th of October 2020.

The above order is therefore certified to the Clerk of the Superior Court, Wake County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 19th day of October

2020.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Nathan A. Huff, Attorney at Law, For Berger, Philip E et al
Ms. Nicole J. Moss, Attorney at Law
Mr. David H. Thompson, Attorney at Law
Mr. Peter A. Patterson, Attorney at Law
Mr. Burton Craige, Attorney at Law
Mr. Alexander McC. Peters, Special Deputy Attorney General
Mr. R. Scott Tobin, Attorney at Law, For Berger, Philip E et al
Marc E. Elias, For Barker, Fowler et al
Ms. Denise S. Upchurch
Lalitha D Madduri, For Barker, Fowler et al
Jyoti Jasrasaria, For Barker, Fowler et al
Uzoma N. Nkwonta, For Barker, Fowler et al
Mr. Narendra K. Ghosh, Attorney at Law, For Barker, Fowler et al
Mr. Terence Steed, Assistant Attorney General, For Berger, Philip E et al
Bobby R. Burchfield, King & Spaulding LLP, For Berger, Philip E et al
Mr. Ryan Y. Park, Solicitor General, For The North Carolina State Board of Elections
Hon. Frank Blair Williams, Clerk of Superior Court

Supreme Court of North Carolina

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From N.C. Court of Appeals
(P20-513)
From Wake
(20CVS8881)

23 October 2020

Ms. Nicole J. Moss
Attorney at Law
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, DC 20036

RE: NC Alliance For Retired Americans, et al. v NC State Board of Elections, et al. - 440P20-1

Dear Ms. Moss:

The following order has been entered on the motion filed on the 21st of October 2020 by Intervenor-Defendants (Philip E. Berger and Timothy K. Moore, in their official capacities) for Temporary Stay:

"Motion Denied by order of the Court in conference, this the 23rd of October 2020."

Beasley, C.J., Recused
Newby, J., Recused
Davis, J., Recused

s/ Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of October 2020.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. Nathan A. Huff, Attorney at Law, For Berger, Philip E et al - (By Email)
Ms. Nicole J. Moss, Attorney at Law, For Berger, Philip E et al - (By Email)
Mr. Burton Craige, Attorney at Law, For Barker, Fowler et al - (By Email)
Mr. Alexander McC. Peters, Special Deputy Attorney General, For The North Carolina State Board of Elections, et al. - (By Email)
Mr. R. Scott Tobin, Attorney at Law, For Republican National Committee, et al. - (By Email)
Mr. Narendra K. Ghosh, Attorney at Law, For Barker, Fowler et al - (By Email)
Mr. Terence Steed, Assistant Attorney General, For The North Carolina State Board of Elections, et al. - (By Email)
Mr. Ryan Y. Park, Solicitor General, For The North Carolina State Board of Elections, et al. - (By Email)
Ms. Kellie Z. Myers, Trial Court Administrator - (By Email)
West Publishing - (By Email)

FILED

2020 OCT -2 PM 4:08

WAKE CO., C.S.C.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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, in his official capacity as 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.

No. 20-CVS-8881

STIPULATION AND CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Executive Defendants Damon Circosta and the North Carolina State Board of Elections (collectively, "the Consent Parties") stipulate to the following and request that this Court approve this Consent Judgment. This Stipulation and Consent Judgment encompasses Plaintiffs' claims, which pertain to elections in 2020 ("2020 elections") and are premised upon the current public health crisis facing North Carolina caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on August 10, 2020, Plaintiffs filed a complaint, and, on August 18, 2020, Plaintiffs filed an amended complaint against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections, of: (1) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b); (2) its requirement that all absentee ballot envelopes must be signed by a witness during the pandemic, as applied to voters in single-person or single-adult households, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) its failure to provide pre-paid postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, as applied to voters who submit ballots through the United States Postal Service, *id.* § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C. Gen. Stat. § 163-226.3(a)(5) (the "Ballot Delivery Ban") (collectively, the "Challenged Provisions");

WHEREAS the Complaint seeks to enjoin enforcement of the Challenged Provisions during the 2020 elections due to the ongoing public health crisis caused by the spread of the novel coronavirus (COVID-19);

WHEREAS the COVID-19 public health crisis is ongoing, and North Carolina remains under Executive Order 163, which contemplates a phased reopening of North Carolina but strongly recommends social distancing, Exec. Order 163, § 2.2, mandates mask wearing in most business and government settings, *id.* § 3.2, imposes capacity limits in most public-facing business and government settings, *id.*, § 3.2(e), prohibits mass gatherings, *id.* § 7, and states that "[p]eople who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes," *id.* § 2.1;

WHEREAS North Carolina remains under a state of emergency, declared by the Governor, "based on the public health emergency posed by COVID-19," Exec. Order 116, and under a federal disaster declaration statewide, 85 Fed. Reg. 20701;

WHEREAS as of September 19, 2020, North Carolina has had more than 192,248 confirmed COVID-19 cases, with more than 3,235 fatalities;

WHEREAS COVID-19 case counts continue to grow across the country, and the director of the Center for Disease Control and Prevention recently warned that the country should brace for "the worst fall from a public health perspective, we've ever had"[1];

WHEREAS the Executive Director of the North Carolina State Board of Elections observed that COVID-19 infections in North Carolina are likely to continue into the fall, through at least Election Day;[2]

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[1] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

WHEREAS, on June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[3] The CDC guidance encourages elections officials to:

- "Encourage voters to stay at least 6 feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained;
- Increase the number of polling locations available for early voting and extend hours of operation at early voting sites;
- Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance;
- Minimize lines as much as possible, especially in small, indoor spaces;
- "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility";
- Offer alternatives to in-person voting;
- Offer alternative voting options that minimize exposure between poll workers and voters;

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[2] N.C. State Bd. of Elections, *Emergency Order, Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency* (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf.

[3] *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

WHEREAS large crowds at early voting and long lines on Election Day may create public health risks and impose severe burdens on the right to vote, making absentee voting by mail essential to ameliorate these possibilities;

WHEREAS, as of September 18, 2020, more than 889,273 absentee ballots had already been requested by North Carolina voters, more than 14 times the number of absentee ballots that had been requested by this time in 2016;

WHEREAS the absentee voting period for the 2020 elections began on September 4, 2020, N.C. Gen. Stat. § 163-227.10(a), and, as of September 21, 2020, nearly 1,400 absentee ballots had been flagged for incomplete witness information, according to data from the State Board of Elections[4];

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.*

WHEREAS courts in other states have enjoined those states from enforcing witness and notarization requirements, some of which are similar to North Carolina's Challenged Provisions,

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[4] *North Carolina Early Voting Statistics*, U.S. Elections Project, https://electproject.github.io/Early-Vote-2020G/NC.html.

for elections occurring this year during the COVID-19 pandemic. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment suspending "notary or two-witness requirement" for mail ballots and finding that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" single-witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become 'both too restrictive and not restrictive enough to effectively prevent voter fraud.'"); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election);

WHEREAS the delivery standards for the Postal Service, even in ordinary times, contemplate at a minimum at least a week for ballots to be processed through the postal system and delivered to election officials[5];

WHEREAS the General Counsel of the Postal Service sent a letter on July 30, 2020 to North Carolina's Secretary of State warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[6] In particular, the Postal Service recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.*;

WHEREAS mail delivery conditions are already leading to greater delays: since mid-July there have been sharp decreases in the percentage of U.S. Postal Service mail, sent by any method, delivered on time;[7]

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[5] *State and Local Election Mail—User's Guide*, U.S. Postal Serv. (Jan. 2020), https://about.usps.com/publications/pub632.pdf.

[6] Letter to North Carolina Secretary of State from USPS General Counsel, App'x to Compl., ECF No. 1-1 at 53-55, *Commonwealth of Pennsylvania v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

[7] *Service Performance Measurement PMG Briefing*, U.S. Postal Serv. (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

WHEREAS on August 21, 2020, the State of North Carolina, along with six other states filed a lawsuit challenging the Postal Service's procedural changes that the State alleges will likely delay election mail even further, creating a "significant risk" that North Carolina voters will be disenfranchised by the State's relevant deadlines governing absentee ballots;

WHEREAS increases in absentee voting, coupled with mail delays, threaten to slow down the process of mailing and returning absentee ballots, and appear likely to impact the 2020 elections;

WHEREAS pursuant to N.C. Gen. Stat. § 163-231(b)(2)(c), North Carolina already accepts military and overseas absentee ballots until the end of business on the business day before the canvass which occurs no earlier than the tenth day after the election, *see id.* § 163-182.5(b);

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also extended Election Day Receipt Deadlines in light of the current public health crisis. *See Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (extending ballot receipt deadline for November 2020 election); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (extending ballot receipt deadline for the November 2020 election); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR (N.D. Ga, Aug. 31, 2020) (granting motion for preliminary injunction in part and extending receipt deadline); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt

deadline and recognizing that enforcing the deadline was likely to disenfranchise thousands of voters); *LaRose v. Simon*, No. 62-CV-20-3149 at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's receipt deadline);

WHEREAS multiple courts have found that the enforcement of various other state election laws during the pandemic violate constitutional rights. *See, e.g., Esshaki v. Whitmer*, 813 F. App'x 170, 173 (6th Cir. 2020) (finding ballot-access provisions unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *Garbett v. Herbert*, No. 2:20-CV-245-RJS, 2020 WL 2064101, at *18 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witness requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3490216 (D. Idaho June 26, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560 (2020);

WHEREAS the State Board of Elections has broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c).

WHEREAS the Executive Director of the State Board, as the chief State elections official, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19;

WHEREAS the Consent Parties agree that an expeditious resolution of this matter for the 2020 elections, in the manner contemplated by the terms of this Stipulation and Consent Judgment, will limit confusion and increase certainty surrounding the 2020 elections and is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest;

WHEREAS the Executive Defendants believe that continued litigation over the Challenged Provisions will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina;

WHEREAS the Consent Parties wish to avoid uncertainty about the requirements and obligations of voting in the 2020 elections for State Board officials and non-parties including county board officials, staff, and election workers, and the voting public;

WHEREAS the Consent Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and the Consent Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, other courts across the country have approved similar consent judgments between parties, *see Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4460914 (D.R.I. July 30, 2020) (approving consent judgment to not enforce Witness Requirement in primary and November general elections); Stipulation and Partial Consent

Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election); *League of Women Voters of Va.*, 2020 WL 2158249 (approving consent judgment to not enforce Witness Requirement in primary election); *see also Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (denying motion to stay the consent judgment and judgment pending appeal) *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

WHEREAS the Executive Defendants do not waive any protections offered to them through federal or state law and do not make any representations regarding the merits of Plaintiffs' claims or potential defenses which could be raised in litigation;

WHEREAS the Consent Parties agree that the Consent Judgment promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs' claims regarding the 2020 elections against the Executive Branch Defendants;

WHEREAS Plaintiffs agree to a waiver to any entitlement to damages and fees, including attorneys' fees, expenses, and costs against the Executive Defendants with respect to any and all claims raised by Plaintiffs in this action relating to the 2020 elections;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Consent Parties, that: (i) the terms of this Consent Judgment constitute a fair and equitable settlement of the issues raised with respect to the 2020 elections, and (ii) the Consent Judgment is intended to and does resolve Plaintiffs' claims;

NOW, THEREFORE, upon consent of the Consent Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Consent Judgment, including relinquishment of certain legal rights, the Consent Parties agree as follows:

II.
JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Article 26 of Chapter 1 of the General Statutes, N.C. Gen. Stat. § 7A-245(a)(2), and N.C. Gen. Stat. § 1-493, and has jurisdiction over the Consent Parties herein. Venue for this action is proper in Wake County Superior Court because the Executive Defendants reside in Wake County. *Id.* § 1-82. The Court shall retain jurisdiction of this Stipulation and Consent Judgment for the duration of the term of this Stipulation and Consent Judgment for purposes of entering all orders and judgments that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Consent Judgment applies to and is binding upon the following parties:

A. Damon Circosta, in his capacity as Chair of the North Carolina State Board of Elections;

B. The North Carolina State Board of Elections; and

C. All Plaintiffs.

IV.
SCOPE OF CONSENT JUDGMENT

A. This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Consent Judgment, they are releasing any claims under the North Carolina Constitution that they might have against Executive Defendants with respect to the Challenged Provisions in the 2020 elections. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Consent Judgment.

B. The Consent Parties to this Stipulation and Consent Judgment acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Challenged Provisions for elections held after the 2020 elections.

C. The Consent Parties to this Stipulation and Consent Judgment further acknowledge that by signing this Stipulation and Consent Judgment, the Consent Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Consent Judgment, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Consent Judgment or defenses thereto.

D. By entering this Stipulation and Consent Judgment, Plaintiffs are fully settling a disputed matter between themselves and Executive Defendants. The Consent Parties are entering this Stipulation and Consent Judgment for the purpose of resolving disputed claims, avoiding the burdens and costs associated with the costs of litigating this matter through final judgment, and ensuring both safety and certainty in advance of the 2020 elections. Nothing in this Stipulation and Consent Judgment constitutes an admission by any party of liability or wrongdoing. The Consent Parties acknowledge that a court may seek to consider this Stipulation and Consent

Judgment, including the violations alleged in Plaintiffs' Amended Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT JUDGMENT OBJECTIVES

In addition to settling the claims of the Consent Parties, the objective of this Stipulation and Consent Judgment is to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

VI.
INJUNCTIVE RELIEF

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND JUDGED FOR THE REASONS STATED ABOVE THAT:

A. For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots, as set forth in N.C. Gen. Stat. § 163-231(b)(2), to the deadline set forth in paragraph VI.B below and in Numbered Memo 2020-22 (attached as Exhibit A).

B. Pursuant to Numbered Memo 2020-22, an absentee ballot shall be counted as timely in the 2020 elections 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. For purposes of this Stipulation and Consent Judgment and as the Numbered Memo requires, a ballot shall be considered postmarked on or before Election Day if it has a postmark affixed to it or if there is information in the Postal Service tracking system (BallotTrax), or another tracking service

offered by the Postal Service or the commercial carrier, indicating that the ballot was in the custody of the Postal Service or a commercial carrier on or before Election Day.

C. For the 2020 elections, Executive Defendants shall institute a process to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19 (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature. If a county board office receives a container-return envelope with such a curable deficiency, it shall contact the voter in writing by mail and, if available, email, within one business day of identifying the deficiency, informing the voter that there is an issue with their absentee ballot and enclosing a cure certification. The written notice shall be sent to the address to which the voter requested their ballot be sent. 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.

D. Pursuant to Numbered Memo 2020-23, (attached as Exhibit C) Executive Defendants shall institute a process for establishing a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices. Such drop-off stations may be located outdoors subject to the conditions set forth in Numbered Memo 2020-23. In addition, when a person returns a ballot in person, the county board intake staffer shall 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 returning the ballot in person indicates that they are not

the voter or the voter's near relative or legal guardian, the county board intake staffer will also require the person to provide their address and phone number.

E. Executive Defendants shall take additional reasonable steps to inform the public of the contents of Numbered Memos 2020-19, -22, -23 and shall encourage all county boards of elections to do the same.

F. Plaintiffs will withdraw their Motion for Preliminary Injunction, filed on August 18, 2020, and will not file any further motions for relief for the 2020 elections based on the claims raised in their Amended Complaint of August 18, 2020.

G. In accordance with the terms of this Stipulation and Consent Judgment, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to this lawsuit.

H. All remaining claims filed by Plaintiffs against the Executive Defendants related to the conduct of the 2020 elections in this action are hereby dismissed with prejudice. The Court will retain jurisdiction of these claims only as to enforcement of the Stipulation and Consent Judgment.

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The parties to this Stipulation and Consent Judgment may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Consent Judgment that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Consent Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Consent Judgment, or for granting any other relief not inconsistent with the terms of this Consent Judgment, until this Consent Judgment is terminated. The Consent Parties may apply to this Court for any orders or

other relief necessary to construe or effectuate this Stipulation and Consent Judgment or seek informal conferences for direction as may be appropriate. The Consent Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If any Party believes that another has not complied with the requirements of this Stipulation and Consent Judgment, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Consent Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Consent Judgment that requires any Party to file a motion with this Court for enforcement of this Stipulation and Consent Judgment.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Consent Parties acknowledge that no person has exerted undue pressure on them to enter into this Stipulation and Consent Judgment. Every Party is voluntarily choosing to enter into this Stipulation and Consent Judgment because of the benefits that are provided under the agreement. The Consent Parties acknowledge that they have read and understand the terms of this Stipulation and Consent Judgment; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Consent Judgment to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Consent Judgment shall be severable, and, should any provisions be declared by a court of competent jurisdiction to be

unenforceable, the remaining provisions of this Stipulation and Consent Judgment shall remain in full force and effect.

C. Agreement. This Stipulation and Consent Judgment is binding. The Consent Parties acknowledge that they have been advised that (i) no other Party has a duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Consent Judgment may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Consent Judgment if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Judgment constitutes the entire agreement between the Consent Parties relating to the constitutionality and enforcement of the Challenged Provisions as they pertain to the 2020 elections. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Consent Judgment are valid unless they are in writing, identified as an amendment to this Stipulation and Consent Judgment, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Consent Judgment except as herein explicitly contained.

E. Warranty. The persons signing this Stipulation and Consent Judgment warrant that they have full authority to enter this Stipulation and Consent Judgment on behalf of the Party each represents, and that this Stipulation and Consent Judgment is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Consent Judgment may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Consent Judgment is effective upon the date it is entered by the Court.

IX.
TERMINATION

This Stipulation and Consent Judgment shall remain in effect through the certification of ballots for the 2020 elections. The Court shall retain jurisdiction to enforce the terms of the Consent Judgment for the duration of this Consent Judgment. This Court's jurisdiction over this Stipulation and Consent Judgment shall automatically terminate after the certification of all ballots for the 2020 elections.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND CONSENT JUDGMENT AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT JUDGMENT TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA CHAIR, NORTH CAROLINA STATE BOARD OF ELECTIONS

Dated: September 22, 2020

By: /s/ Alexander McC. Peters
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North Carolina Dept. of Justice
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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ

Dated: September 22, 2020

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Molly Mitchell

20 CVS 8881

IT IS SO ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT JUDGMENT.

Dated: 10/2/20

Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below by electronic mail, with their consent to receive electronic service, as follows:

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Counsel for Intervenor-Defendants, the Republican Committees

Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 2nd day of October 2020.

Kellie Z. Myers
Trial Court Administrator – 10th Judicial District
kellie.z.myers@nccourts.org

JOSHUA H. STEIN
ATTORNEY GENERAL

RYAN PARK
SOLICITOR GENERAL

October 18, 2020

Daniel M. Horne, Jr.
Clerk of Court
One West Morgan Street
Raleigh, NC 27601
(919) 831-3600

Re: *N.C. Alliance for Retired Americans v. N.C. Board of Elections,* P20-513

Dear Mr. Horne:

I write to provide relevant information on the scope of issues that are presented to this Court in the above-captioned appeal.

At the time that the State Board submitted its response to the petitions for writ of supersedeas, the Board understood the intervenors to be contesting the cure process described in Numbered Memo 2020-19. However, in their proposed reply brief submitted to this Court, the legislative intervenors clarified that their appeal does not encompass a challenge to the cure process. *See* Ex. A at 8 (stating that the "State Board Defendants are free to re-start the cure process"). The legislative intervenors made a similar clarification in a brief filed in the U.S. Court of Appeals for the Fourth Circuit, stating that their appeal to that court in a related case does not challenge the cure process. *See* Ex. B at 1-2.

In subsequent correspondence between the parties, counsel for the legislative intervenors reiterated their understanding that nothing in this appeal affects the Board's authority to implement a cure process. They have further stated that they do not contest the Board's authority to immediately implement the procedures set forth in Numbered Memo 2020-19 so long as: (1) those procedures comply with an order by a federal district court that the absence of a witness or assistance signature is not a curable defect, and (2) the memo does not refer to the extended absentee-ballot receipt deadline that remains a matter of dispute. *See* Ex. C.

The Board has prepared a revised Numbered Memo 2020-19 that satisfies those conditions. *See* Ex. D.

Counsel for the Republican National Committee intervenors have also expressed that they do not oppose implementation of the Numbered Memo as revised, "but reserve their rights

to challenge this cure procedure as applied if it is being used to evade the witness requirement." *See* Ex. E.

Thus, the Board writes to communicate the parties' mutual understanding that the Board may proceed with the cure process described in revised Numbered Memo 2020-19, notwithstanding the temporary administrative stay that this Court entered on Thursday, 15 October 2020. *See* Ex. D. Based on this mutual understanding, and the pressing need to enable thousands of lawful voters to cure their ballots in time to exercise their right to vote, the Board intends to proceed to implement revised Numbered Memo 2020-19 at noon tomorrow, Monday 19 October 2020. Should the Court have any questions or concerns about the Board's intended course of action, please do not hesitate to contact me at any time.

Respectfully submitted,

/s/ Ryan Y. Park
Ryan Y. Park
Solicitor General

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cc: All counsel of record

Exhibit A

NORTH CAROLINA COURT OF APPEALS
****

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*, 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*, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; *and* NORTH CAROLINA REPUBLICAN PARTY,	From Wake County No. 20 CVS 8881

	)
Republican Committee	)
Intervenor-Defendants.	)

****

MOTION FOR LEAVE TO FILE REPLY

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Intervenor-Defendants 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 ("Legislative Defendants"), respectfully request leave to file a very brief reply to respond to an argument raised in State Defendants' Response in Opposition to Intervenors' Petitions for Writ of Supersedeas. *See N. C. State Conference of NAACP v. Moore*, 817 S.E.2d 592, 593 (N.C. 2018) (mem.) (granting plaintiffs' motion "for Leave to File Reply to Response in Opposition to Petition for Writ of Supersedeas"); *cf. Animal Prot. Soc. of Durham, Inc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) ("The reply brief was intended to be a vehicle for responding to matters raised in the appellees' brief.").

In particular, State Defendants argue that granting Legislative Defendants' petition will indefinitely paralyze the North Carolina State Board of Elections' ability to help voters cure or re-vote deficient absentee ballots. In reality, as more fully explained in Legislative Defendants' proposed Reply, an order granting our petition

would in no way deprive the voters of this State of access to a cure process. Any further delay on that score would be attributable wholly to the State Board.

Legislative Defendants' proposed reply is filed contemporaneously as an attachment to this motion.

Respectfully submitted this the 16th day of October, 2020.

COOPER & KIRK PLLC

By: /s/ Electronically Submitted
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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ATTORNEYS FOR LEGISLATIVE DEFENDANTS 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

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16th day of October, 2020, served a copy of the foregoing Motion for Leave to File Reply Brief by electronic mail and by first class mail on the following business day, on the following parties at the following addresses:

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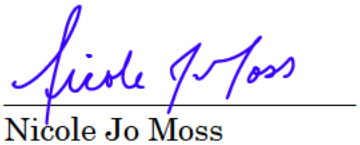

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NORTH CAROLINA COURT OF APPEALS
****

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*, 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*, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; *and* NORTH CAROLINA REPUBLICAN PARTY,	From Wake County No. 20 CVS 8881

)
Republican Committee)
Intervenor-Defendants.)

****

PROPOSED REPLY TO STATE DEFENDANTS' RESPONSE IN OPPOSITION TO INTERVENORS' PETITION FOR WRIT OF SUPERSEDEAS

****

Argument

State Board Defendants open their response by attempting to create a specter of "administrative urgency," State Board Response at 6, alleging that "[u]nless and until the State Board is permitted to implement the consent judgment approved by the court below, the votes of thousands of North Carolinians who have already cast their ballots by mail, but with minor technical deficiencies, will remain in administrative limbo," *id*. at 2. But this claim is false: State Board Defendants are free to re-start the cure process they unilaterally stopped on October 4, and that is so regardless of whether this Court enters a writ of supersedeas.

The relevant background is set forth at length in the Middle District of North Carolina's recent opinions in *Democracy N.C. v. North Carolina State Board of Elections*, 2020 WL 6058048, No. 20-cv-457 (M.D.N.C. Oct. 14, 2020) and *Moore v. Circosta*, 2020 WL 6063332, No. 20-cv-911 (M.D.N.C. Oct. 14, 2020). In short, following a preliminary injunction entered on due-process grounds in *Democracy N.C.*, the State Board on August 21, 2020, issued Numbered Memo 2020-19 to establish a uniform cure process for absentee ballots. *See Democracy N.C.*, 2020 WL

6058048, at *2. Absentee voting began on September 4, but on September 22, 2020—before the entry of the consent judgment in this case—the State Board issued a revised Numbered Memo 2020-19 purporting to allow voters to "cure" ballots wholly devoid of witness information through a simple affidavit. *Id*. at *3. The consent judgment in this case was entered on October 2, and its "WHEREAS" clauses expressly reference the *Democracy N.C.* preliminary injunction. *Id*. at *4.

The State Board did not file Numbered Memo 2020-19 with the Middle District of North Carolina until September 28, 2020—despite telling the Superior Court it had done so on September 22—and the Middle District swiftly indicated that the Memo's evisceration of the witness requirement was "not consistent with" that court's preliminary injunction ruling, which had *upheld* the witness requirement. *See id.* at *6; *Moore*, 2020 WL 6063332, at *5. On October 1, the State Board put a halt to the cure process for ballots missing witness signatures, but otherwise left Numbered Memo 2020-19's cure procedures in place. *See* Numbered Memo 2020-27, https://bit.ly/3lWy4M2.

On October 3, however, the federal court in *Moore* entered a temporary restraining order halting enforcement of the *revised* Numbered Memo 2020-19, but the order explicitly did "not enjoin or affect the *August* 2020-19 memo." *Moore v. Circosta*, No. 5:20-cv-507, 2020 WL 5880129, at *9 (Oct. 3, 2020) (emphasis added). In response, however, the State Board unilaterally put a halt to the cure process *altogether*. *See* Numbered Memo 2020-28, at https://bit.ly/2H5O13z. It did so despite the severability clause in the Consent Judgment anticipating that its provisions could

be rendered "unenforceable" by a ruling of another court, State Board Response App. 61, and despite the Supremacy Clause giving precedence to the federal court's ruling, *see Gen. Atomic Co. v. Felter*, 434 U.S. 12, 15 (1977).

That is how things stood until October 14, when the Middle District of North Carolina (a) denied our motion for a preliminary injunction in *Moore*, but (b) in *Democracy North Carolina* enjoined Numbered Memo 2020-19 to the extent it allowed for an affidavit-only cure for missing witness or assistant signatures. *See Democracy North Carolina*, 2020 WL 6058048, at *13. We have appealed the ruling in *Moore* and sought an injunction pending appeal, *but we have not sought to further enjoin implementation of Numbered Memo 2020-19 other than its incorporation of the ballot receipt extension deadline. See* Emergency Motion for Injunction Pending Appeal at 1, *Moore v. Circosta*, No. 20-2107 (4th Cir. Oct. 16, 2020), ECF No. 4.

In light of the foregoing, once the *Moore* temporary restraining order expires at midnight tonight the State Board will be in the same position today as it was on October 1—free to implement Numbered Memo 2020-19 and its cure process, except for the affidavit-only cure for missing witness or assistant signatures. Getting the cure process moving is therefore no basis for denying the petition here, as any delay in doing so is entirely of the State Board's own doing. And it certainly is no basis for denying the petition *entirely*, including with respect to the ballot receipt deadline and alteration of the postmark requirement.

Conclusion

For these reasons and those presented in our Petition, the Court should grant a Writ of Supersedeas to stay the Superior Court's consent judgment.

Respectfully submitted this the 16th day of October, 2020.

COOPER & KIRK PLLC

By: /s/ Electronically Submitted
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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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ATTORNEYS FOR LEGISLATIVE DEFENDANTS 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

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 16th day of October, 2020, served a copy of the foregoing Proposed Reply To State Defendants' Response In Opposition To Intervenors' Petition For Writ Of Supersedeas by electronic mail and by first class mail on the following business day, on the following parties at the following addresses:

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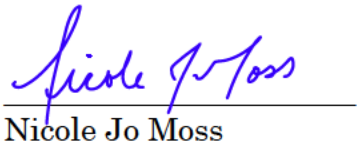

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Exhibit B

No. 20-2107

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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-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 of Elections, JEFFERSON 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-Appellees,

&

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

Intervenor-Appellees.

Appeal from the United States District Court
for the Middle District of North Carolina

Plaintiffs-Appellants' Reply in Support of Emergency Motion for an Injunction Pending Appeal

October 16, 2020 (counsel listed on reverse)

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Counsel for Plaintiffs-Appellants

Appellants respectfully submit this reply to Appellees' response and in further support of Appellants' emergency motion for an injunction pending appeal. In the interest of time and to ensure that the Court may expeditiously consider Appellants' motion, Appellants raise a few particularly pertinent points here and otherwise rely on the arguments set forth in our motion, on Judge Dever's order granting a temporary restraining order ("TRO"), Judge Osteen's orders in *Democracy North Carolina* and *Moore*, and Appellants' responses to Appellees' and Intervenor-Appellees' motions to stay the TRO in the prior appeal in this case.

ARGUMENT

First, Appellees contend that the North Carolina State Board of Elections ("NCSBE") will suffer irreparable harm if the Court grants an injunction pending appeal because that injunction would bar the NCSBE from informing voters that their ballots contain "minor deficiencies, like placing a signature in the wrong place." Response to Emergency Motion for Injunction Pending Appeal at 25–26, Doc. 12-1 (Oct. 16, 2020) ("Response"). But as Appellants' motion makes clear, the *only* aspect of the revised Numbered Memo 2020-19 that Appellants are seeking to enjoin is the extension of the receipt deadline. *See* Plaintiffs-Appellants Emergency Motion for an Injunction Pending Appeal at 1, Doc. 4 (Oct. 16, 2020) ("Motion"). Appellants have explicitly not asked this Court to enjoin the entire cure process, *see id.*, so even if this Court enters an injunction pending appeal Appellees can

implement the cure process they had in place prior to the TRO, subject to Judge Osteen's injunction against allowing the curing of missing witness signatures with a voter affidavit. *See* Memorandum Opinion & Order at 40–41, Doc. 169, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. Oct. 14, 2020).

Second, Appellees incorrectly cite the Supreme Court's standard for issuing an injunction pending appeal. *See* Response at 4–5. The Supreme Court's authority to issue an injunction pending appeal arises from the All Writs Act. *See Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers). And though this Court has not "made a clear statement about what standard should be applied in determining whether to grant a[n] . . . injunction pending appeal," *Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs*, 890 F. Supp. 2d 688, 690 (S.D. W. Va. 2012), it has recognized a few factors that must be considered. One factor is "whether the petitioner has made a strong showing that he is likely to prevail on the merits of his appeal." *Miltenberger v. Chesapeake & Ohio Ry. Co.*, 450 F.2d 971, 974 (4th Cir. 1971). Another factor is "irreparable injury." *See Sinai Hosp. of Balt., Inc. v. Scearce*, No. 76-2259, 1976 WL 4205, at *2 (4th Cir. Nov. 10, 1976) (Winter, C.J., in chambers). These factors are part of a common standard for granting an injunction pending appeal that many of the Courts of Appeals share. According to that standard, an injunction pending appeal will be granted if the movant establishes (1) "a substantial likelihood that it will prevail on the merits of the

appeal," (2) "a substantial risk of irreparable injury unless the injunction is granted," (3) "the threatened injury to the [movants] exceeds whatever damage an injunction may cause the [nonmovants]," and (4) "any injunction would not disserve the public interest." *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1344 (11th Cir. 2014) (W. Pryor, J., specially concurring) (*citing Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)); *see also, e.g.*, *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017); *United States v. Alabama*, 443 F. App'x 411, 419–20 (11th Cir. 2011); *Korte v. Sebelius*, 528 F. App'x 583, 586 (7th Cir. 2012); *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988); *Fath v. Tex. Dep't of Transp.*, 670 F. App'x 294, 295 (5th Cir. 1982). As Appellants demonstrated in their motion, these factors counsel in favor of issuing an injunction in this case.

Third, Appellees oppose Appellants' Equal Protection and Elections Clause claims by contending that the NCSBE was authorized under state law to take the actions it did—in other words, to unilaterally change state election law in contravention of the General Assembly's duly enacted laws. But as the district court found, the NCSBE lacked authority to make the extensive alterations to the election laws through the Memoranda under either N.C. GEN. STAT. § 163-22.2 or § 163-27.1. *See* Motion App. 146–53. Section 163-22.2 does not authorize the NCSBE to

implement rules that directly conflict with the General Assembly's duly enacted laws—like the statutory receipt deadline—and the Executive Director did not have the power to redefine the meaning of "natural disaster" under § 163-27.1 to include a pandemic to exercise her emergency powers to make the changes. What is more, § 163-27.1 is inapplicable on its face because it requires "the normal schedule for the election" to have been "disrupted," but the normal schedule for the November 2020 election has not been altered in any way. Consequently, without the lawful authority they claim to have had, Appellees' entire opposition to Appellants' claims falls apart.

Fourth, Appellees' argument that Appellants' Equal Protection claim based on arbitrary and nonuniform treatment fails because "minor differences in treatment among voters simply do not support an equal-protection violation," Response at 22–23, is meritless. Judge Osteen found that Appellants were likely to prevail on the merits of their Equal Protection claim in this respect because Appellees' actions subject Appellants Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. Motion App. 120–25. Appellants will not address the particularities of the various cases that Appellees cite, but Appellees' actions are unconstitutional here because they were *arbitrary*.

Fifth, Appellees maintain that courts could have struck down the witness requirement, so their elimination of it via memoranda was a reasonable response to avoid protracted litigation. *See* Response at 13. But a three-judge panel of the North Carolina Superior Court and the Middle District of North Carolina have upheld North Carolina's witness requirement for this fall's election on full preliminary injunction records. *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 4484063, at *36 (M.D.N.C. Aug. 4, 2020); Order on Injunctive Relief at 6–7, *Chambers v. State*, No. 20-CVS-500124 (N.C. Wake Cnty. Super. Ct. Sept. 3, 2020). And the Supreme Court recently for the second time stayed an injunction of a witness requirement during the pandemic. *See Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). Furthermore, with respect to the ballot receipt deadline, several federal appellate courts have also recently stayed injunctions extending *election day* ballot receipt deadlines that are stricter than North Carolina's deadline of three days *after* the election. *See New Ga. Project v. Raffensperger*, No. 20-13360, 2020 WL 5877588 (11th Cir. Oct. 2, 2020) (staying injunction of Georgia's election day deadline); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359 (7th Cir. Oct. 8, 2020) (staying extension of Wisconsin's election day deadline); *Common Cause of Ind. v. Lawson*, No. 20-2911, 2020 WL 6042121 (7th Cir. Oct. 13, 2020) (staying extension of Indiana's election day deadline).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant their motion for an injunction pending appeal.

Dated: October 16, 2020

Respectfully submitted,

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Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(a). The reply is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 1,248 words (exclusive of the parts of the document exempted by Federal Rule of Appellate Procedure 32(f)), as measured by Microsoft Word.

/s/ David H. Thompson
David H. Thompson

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Local Rule 25(b)(2), I hereby certify that on October 16, 2020, I electronically filed the foregoing reply with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties has been accomplished via ECF.

/s/ David H. Thompson
David H. Thompson

Exhibit C

Park, Ryan

From: David Thompson <dthompson@cooperkirk.com>
Sent: Friday, October 16, 2020 9:34 PM
To: Peters, Alec
Cc: Burton Craige; Narendra Ghosh; Paul Smith; melias@perkinscoie.com; UNkwonta@perkinscoie.com; Glickman, Ariel (Perkins Coie); Jasrasaria, Jyoti (Perkins Coie); Madduri, Lalitha (Perkins Coie); nathan.huff@phelps.com; Nicole Moss; Pete Patterson; stobin@taylorenglish.com; Burchfield, Bobby; Leland, Matthew; Park, Ryan; Steed, Terence
Subject: Re: NC Court of Appeals P20-513—State Board Defendants' Response in Opposition to Intervenors' Petitions for Writs of Supersedeas

Alec,

I am writing to correct your email below.

To be clear, as of midnight tonight, the state board of elections is free to implement its revised memo 2020-19 with the exception of the cure procedure for the absence of a witness signature or assistance signature (and the reference to the ballot deadline extension).

That revised memo was put into place before the consent judgment and thus is not implicated by our continued efforts to stay and enjoin the implementation of the consent judgment.

Have a good weekend.

Regards,
David

David H. Thompson
Cooper & Kirk, PLLC
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202-220-9659

> On Oct 16, 2020, at 9:02 PM, Peters, Alec <apeters@ncdoj.gov> wrote:
>
> Bobby,
>
> We have received the Request for Leave to File a Reply and the proposed Reply submitted by the Legislative defendants earlier today. We understand the Legislative defendants to represent to the Court of Appeals that they are not challenging the cure provisions of the Consent Judgment, administered in conjunction with Judge Osteen's order, and that they further represent to the court that they do not believe that the stay issued by the court last night extends to the cure provisions. Can you please confirm as soon as possible whether the RNC Committees share in that position.

Thank you.

Best regards,
Alec Peters

Alexander McC. Peters
Chief Deputy Attorney General
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apeters@ncdoj.gov
114 W. Edenton St., Raleigh, NC 27603
ncdoj.gov

Please note messages to or from this address may be public records.

From: Peters, Alec
Sent: Friday, October 16, 2020 12:52 PM
To: Burton Craige <bcraige@pathlaw.com>; Narendra Ghosh <nghosh@pathlaw.com>; Paul Smith <psmith@pathlaw.com>; melias@perkinscoie.com; UNkwonta@perkinscoie.com; Glickman, Ariel (Perkins Coie) <AGlickman@perkinscoie.com>; Jasrasaria, Jyoti (Perkins Coie) <JJasrasaria@perkinscoie.com>; Madduri, Lalitha (Perkins Coie) <LMadduri@perkinscoie.com>; nathan.huff@phelps.com; Nicole Moss <nmoss@cooperkirk.com>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; stobin@taylorenglish.com; Burchfield, Bobby <BBurchfield@KSLAW.com>; Leland, Matthew <MLeland@KSLAW.com>
Cc: Park, Ryan <rpark@ncdoj.gov>; Steed, Terence <Tsteed@ncdoj.gov>
Subject: NC Court of Appeals P20-513—State Board Defendants' Response in Opposition to Intervenors' Petitions for Writs of Supersedeas

Counsel, attached please find the State Board Defendants' Response in Opposition to Intervenors' Petitions for Writs of Supersedeas, which has just been filed with the North Carolina Court of Appeals.

Best regards,
Alec Peters

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Chief Deputy Attorney General
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Please note messages to or from this address may be public records.

Exhibit D

NORTH CAROLINA
STATE BOARD OF ELECTIONS

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Fax: (919) 715-0135

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]

---

[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

---

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.

Exhibit E

Park, Ryan

From: Burchfield, Bobby <BBurchfield@KSLAW.com>
Sent: Saturday, October 17, 2020 10:06 PM
To: Park, Ryan; Peters, Alec; David Thompson
Cc: Burton Craige; Narendra Ghosh; Paul Smith; melias@perkinscoie.com; UNkwonta@perkinscoie.com; Glickman, Ariel (Perkins Coie); Jasrasaria, Jyoti (Perkins Coie); Madduri, Lalitha (Perkins Coie); nathan.huff@phelps.com; Nicole Moss; Pete Patterson; stobin@taylorenglish.com; Leland, Matthew; Steed, Terence
Subject: RE: NC Court of Appeals P20-513—State Board Defendants' Response in Opposition to Intervenors' Petitions for Writs of Supersedeas

In these circumstances, my clients will not oppose the draft cure Memo you sent, Numbered Memo 2020-19 (version 3), but reserve their rights to challenge this cure procedure as applied if it is being used to evade the witness requirement.

No.

SUPREME COURT OF NORTH CAROLINA
****

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*, 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*, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; *and* NORTH CAROLINA REPUBLICAN PARTY,	From Wake County No. P20-513 No. 20 CVS 8881

)
Republican Committee)
Intervenor-Defendants.)

****

PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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No.

SUPREME COURT OF NORTH CAROLINA
****

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*, 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*, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; *and* NORTH CAROLINA REPUBLICAN PARTY,	From Wake County No. P20-513 No. 20 CVS 8881

	)
Republican Committee	)
Intervenor-Defendants.	)

****

PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Intervenor-Defendants 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 (together, "Legislative Defendants"), respectfully petition this Court to issue a temporary stay and a writ of supersedeas.

INTRODUCTION

On October 2, 2020, the Wake County Superior Court, the Honorable George B. Collins, Jr. presiding, entered an order approving a proposed consent judgment between Plaintiffs and the North Carolina State Board of Elections ("NCSBE") that radically changes North Carolina election procedures ***in the midst of an election in which hundreds of thousands of citizens have already voted*** and in contradiction to duly enacted North Carolina law. Absent immediate relief, the implementation of the consent judgment will engender substantial confusion among both voters and election officials, create considerable administrative burdens, and produce disparate treatment of voters in the ongoing election—all after in-person early voting has already started and a mere 13 days from election day. Indeed, the

State Board has already informed the Fourth Circuit that "the North Carolina Court of Appeals denied the petitions for writ of supersedeas and dissolved a temporary administrative stay" in this case and that accordingly it had "instructed county boards of elections to implement all three Numbered Memoranda" that are reflected in the consent judgment. *See* Defendants' 28(j) Letter, ECF No. 21, *Moore v. Circosta*, No. 20-2107 (4th Cir. Oct. 19, 2020) (attached as Doc. Ex. 1181).

In asking the Superior Court to enter the consent judgment, the NCSBE joined Plaintiffs in seeking to rewrite the North Carolina General Assembly's carefully considered, balanced structure of election laws and substitute their judgment instead. But the U.S. Constitution expressly vests the General Assembly with the authority to prescribe the times, places, and manner of holding elections for federal office in the State of North Carolina, subject to a legislative check by the U.S. Congress. U.S. CONST. art. I, § 4. And the General Assembly recently revised the election laws—on a bipartisan basis—to address concerns related to the COVID-19 pandemic, including by reducing to one the number of individuals required to witness an absentee ballot, *see* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169") § 1.(a); expanding the pool of authorized poll workers to include county residents beyond a particular precinct, *id.* § 1.(b); allowing absentee ballots to be requested online, by fax, or by email, *id.* §§ 2.(a), 7.(a); giving additional time for county boards to canvass absentee ballots, *id.* § 4; and providing over $27 million in funding for election administration, *id.* § 11.

Plaintiffs, however, believe they know better than North Carolina's elected officials what needs to be done to balance the State's interests in election administration, access to the polls, and election integrity during a global pandemic. Apparently unsatisfied with HB1169, which gives them some, but not all, of what they seek, Plaintiffs filed suit on August 10, 2020, nearly two months after HB1169 was signed into law. Now pursuant to their consent judgment with the NCSBE, they have radically changed North Carolina election procedures in contradiction to North Carolina law, including by extending the absentee ballot receipt deadline and amending the postmark requirement for ballots received after election day. The agreement also purported to vitiate the absentee ballot witness requirement, but that attempt has now been halted by a federal court.

Fortunately for North Carolinians, this Court is likely to vacate the consent judgment for at least six independent reasons. *First*, because Plaintiffs assert facial challenges to the election laws at issue, the single-judge Superior Court did not have jurisdiction to consider their claims and enter the consent judgment. *See State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 553–54 (2019); N.C. GEN. STAT. §§ 1A-1, Rule 42, 1-81.1(a1), 1-267.1(a1). *Second*, Legislative Defendants are necessary parties to any consent judgment in this case under state law, N.C. GEN. STAT. § 120-32.6(b), and because they do not consent, the consent judgment must be vacated. *Third*, the consent judgment is illegal because it violates the federal Constitution's Elections Clause and Equal Protection Clause. *Fourth*, the consent judgment is not "fair, adequate, and reasonable," *United States v. North Carolina*, 180 F.3d 574, 581 (4th

Cir. 1999), because Plaintiffs were unlikely to succeed on the merits of their claims and the relief contemplated by the consent judgment is vastly disproportionate to the expected harm. *Fifth*, the consent judgment is against the public interest. And *sixth*, there is a risk that the consent judgment is a product of collusion, not an arm's length agreement between Plaintiffs and the NCSBE.

Indeed, on October 3, 2020, the District Court for the Eastern District of North Carolina, recognizing that plaintiffs in a federal suit (including Legislative Defendants, individual voters, and a congressional candidate) were likely to succeed on the merits of their claims in that court that the numbered memoranda that comprise the consent judgment violate the federal Equal Protection Clause, granted a temporary restraining order enjoining the NCSBE from enforcing them. Order at 12, 19, ECF No. 47, *Moore v. Circosta*, No. 20-cv-507 (E.D.N.C. Oct. 3, 2020) (attached as Doc. Ex. 1). And on October 14, 2020, the District Court for the Middle District of North Carolina, in the same case after transfer, determined that plaintiffs had demonstrated a likelihood of success on the merits with respect to their Equal Protection challenge to the absentee ballot receipt deadline extension implemented through Numbered Memo 2020-22. Memorandum Opinion & Order at 57, ECF No. 74, *Moore*, No. 20-cv-911 (M.D.N.C. Oct. 14, 2020) (attached as Doc. Ex. 908). These rulings underscore the unlawful nature of the NCSBE's actions.

In opposing Legislative Defendants' motion for a temporary stay pending appeal and petition for a writ of supersedeas below, the NCSBE attempted to create a specter of "administrative urgency," State Board Defendants' Response in

Opposition to Intervenors' Petitions for Writ of Supersedeas at 6, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. P20-513 (N.C. Ct. App. Oct. 16, 2020) (attached as Doc. Ex. 1000), alleging that "[u]nless and until the State Board is permitted to implement the consent judgment approved by the court below, the votes of thousands of North Carolinians who have already cast their ballots by mail, but with minor technical deficiencies, will remain in administrative limbo," *id.* at 2. But that claim has been entirely obviated. In an October 18, 2020 letter to the North Carolina Court of Appeals Clerk of Court, the NCSBE stated that it had reached an understanding with Legislative Defendants and the Republican National Committee intervenors to implement a revised Numbered Memo 2020-19 that complies with the Middle District of North Carolina's order determining that the absence of a witness or assistant signature is not a curable defect and that does not refer to the extended absentee ballot receipt deadline that remains a matter of dispute. *See* Letter from Ryan Y. Park to Daniel M. Horne, Jr., Clerk of Court (Oct. 18, 2020) (attached as Doc. Ex. 1077); Memorandum Opinion & Order, ECF No. 169, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. Oct. 14, 2020) (attached as Doc. Ex. 1115). Consequently, the NCSBE is free to restart the cure process they unilaterally stopped on October 4, and that is so regardless of whether this Court enters a writ of supersedeas.

The public interest also favors staying the Superior Court's judgment, as voters face a greater risk of irreparable harm if the consent judgment is not stayed. Regardless of what happens in this or any other lawsuit moving forward, any ballot

that complies with the statutes and guidance in place when voting started on September 4 will count. The same cannot be said of votes that would count only under the consent judgment and the Numbered Memoranda implementing it.

For these and the additional reasons explained below, the consent judgment is likely to be vacated on appeal. And coupled with the irreparable injury that the consent judgment inflicts on North Carolina's ability to hold a safe and fair election in the midst of a worldwide pandemic, that means that a writ of supersedeas should issue staying the consent judgment and preserving the status quo it upsets. Because the relief that has been ordered is extraordinarily important and time-sensitive, Legislative Defendants also respectfully apply, pursuant to Rule 23(e), for **an order temporarily staying enforcement of the consent judgment until determination by this Court of whether it shall issue its writ**. A temporary stay is necessary to prevent irreparable harm while this Court determines whether it shall issue its writ of supersedeas. In support of their petition and motion, Legislative Defendants show the following:

FACTS

I. NORTH CAROLINA'S EFFORTS TO EXPAND VOTING OPPORTUNITIES IN LIGHT OF THE COVID-19 PANDEMIC

On March 26, 2020, the Executive Director of the NCSBE addressed a letter to General Assembly members and Governor Cooper requesting various changes to the State's election laws to account for the COVID-19 pandemic. *See* Karen Brinson Bell Letter (March 26, 2020) (attached as Doc. Ex. 22). The General Assembly responded by passing bipartisan legislation, HB1169, in mid-June by a total vote of 142–26, and

it was signed into law by Governor Cooper on June 12. HB1169 altered North Carolina election law to cope with the pandemic in numerous ways but reflected the General Assembly's reasoned decision not to adopt all of Executive Director Bell's recommendations.

II. PROCEDURAL HISTORY

Plaintiffs filed this suit in Wake County Superior Court on August 10, 2020, nearly two months after HB1169 was signed into law, alleging that several provisions of North Carolina's election laws are unconstitutional during the COVID-19 pandemic as violations of the North Carolina Constitution. Specifically, Plaintiffs challenged

> (1) limitations on the number of days and hours of early voting that counties may offer, N.C.G.S. § 163-227.2(b); (2) the requirement that all absentee ballot envelopes must be signed by a witness, . . . [HB1169] § 1.(a)[;] (3) the State's failure to provide pre-paid postage for absentee ballots and ballot request forms during the pandemic, *id.* § 163-231(b)(1)[;] (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, . . . *id.* § 163-231(b)(2)[;] (5) the practice in some counties of rejecting absentee ballots for signature defects, or based on an official's subjective determination that the voter's signature on the absentee ballot envelope does not match the signature on file with election authorities, without providing sufficient advance notice and an opportunity to cure[;] (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239 § 1.3(a)[;] and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C.G.S. § 163-226.3(a)(5).

Am. Compl. ¶ 5 (Aug. 18, 2020).

Plaintiffs named as defendants the State of North Carolina, the NCSBE, and Damon Circosta, in his official capacity as chair of the NCSBE. On August 12, 2020, Legislative Defendants noticed their intervention as of right as agents of the State on behalf of the General Assembly under N.C. GEN. STAT. §§ 1A-1, Rule 24 and 1-72.2(b). On August 18, 2020, Plaintiffs filed an Amended Complaint that dropped the State of North Carolina as a defendant and on the same day moved for a preliminary injunction of the various election laws and requirements at issue. Not until September 4, however, did Plaintiffs file their brief and supporting evidence—nearly a month after filing suit.

After holding a hearing on the nature of Plaintiffs' constitutional challenges, on September 24, 2020, the Superior Court determined that Plaintiffs were not raising facial challenges to the validity of acts of the General Assembly, and therefore declined to transfer the matter to a three-judge panel of the Superior Court. *See* N.C. GEN. STAT. §§ 1-267.1, 1A-1, Rule 42(b)(4).

On September 22, 2020, Plaintiffs and the NCSBE jointly moved the Superior Court for entry of a proposed consent judgment. The court heard argument on the motion on October 2, 2020, and it entered an order granting the motion the same day. The court entered findings of fact and conclusions of law supporting that order on October 5. The court determined that Plaintiffs were likely to succeed on the merits of their constitutional claims, Findings of Fact and Conclusions of Law Supporting October 2, 2020 Order Granting Joint Motion for Entry of Consent Judgment ¶ 17, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20 CVS 8881 (Oct. 5,

2020) (attached as Doc. Ex. 1169); the consent judgment was fair, adequate, and reasonable because it was not illegal or the product of collusion, *id.* ¶ 18; the North Carolina State Board of Elections ("NCSBE") had authority to enter into the consent judgment under both N.C. GEN. STAT. § 163-22.2 and § 163-27.1, *id.* ¶¶ 22–25; Plaintiffs Berger and Moore, as statutory representatives of the General Assembly's interests in this case, were not necessary parties to the consent judgment, *id.* ¶ 26; and the consent judgment and the Memoranda at issue were consistent with both the North Carolina Constitution and the U.S. Constitution, neither violating the Elections Clause nor the Equal Protection Clause, *id.* ¶¶ 29–31. The court also declined to grant Legislative Defendants' request that the court stay enforcement of the consent judgment pending appeal by entering the judgment. Legislative Defendants filed their Notice of Appeal from the trial court's judgment on October 6, 2020. Notice of Appeal, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections* (Oct. 6, 2020) (attached as Doc. Ex. 1187).

Legislative Defendants renewed their request to stay enforcement of the consent judgment pending appeal on October 7, 2020. Because Plaintiffs and the NCSBE opposed Legislative Defendants' motion, the Court set a hearing for Friday, October 16, 2020, and denied the motion at the end of the hearing.

Legislative Defendants also filed a petition for writ of supersedeas and motion for temporary stay with the Court of Appeals. That petition was dismissed without prejudice on October 6, 2020 for failure to comply with Rule of Appellate Procedure 23(a)(1). Legislative Defendants therefore again sought a writ of supersedeas and

temporary stay from the Court of Appeals on October 9, 2020, only to have their petition dismissed again on October 13, 2020 for failure to comply with Rule 23(a)(1)'s requirement that an appeal be taken. That same day, Legislative Defendants cured the issue with their petition by attaching their notice of appeal, and the Court of Appeals granted it in part, temporarily staying the consent judgment pending a ruling on the petition for a writ of supersedeas. Order, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. P20-513 (N.C. Ct. App. Oct. 15, 2020) (attached as Doc. Ex. 1157). On October 19, 2020, the Court of Appeals denied the motion and dissolved the temporary stay. Order, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. P20-513 (N.C. Ct. App. Oct. 19, 2020) (attached as Doc. Ex. 1160).

Accordingly, Legislative Defendants now petition this Court for a writ of supersedeas pursuant to Rule of Appellate Procedure 23 to stay enforcement of the consent judgment pending appeal, and further move the Court to temporarily stay the consent judgment, on an emergency basis, pending its decision whether to issue a writ of supersedeas. *See* N.C. R. App. P. 8.

REASONS WHY THE COURT SHOULD CONSIDER THIS PETITION

Rule 23(a)(1) explicitly provides that "[a]pplication may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal" provided that "a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal" or "extraordinary circumstances make it impracticable

to obtain a stay by deposit of security or by application to the trial tribunal for a stay order." N.C. R. App. P. 23(a)(1). Rule 23(a)(2) further provides that "no petition will be entertained by the Supreme Court unless the application has been made first to the Court of Appeals and denied by that court." Legislative Defendants did so petition the Court of Appeals and that petition was denied. Doc. Ex. 1161.

REASONS WHY THE WRIT SHOULD ISSUE

A writ of supersedeas should issue when justice so requires, Rule 23(c), and its purpose is "to preserve the Status quo pending the exercise of appellate jurisdiction," *Craver v. Craver*, 298 N.C. 231, 238, 258 S.E.2d 357, 362 (1979). There is limited authority on the legal standard that governs the availability of a writ of supersedeas and temporary stay pending appeal, but what precedent exists supports the application of the familiar test balancing (1) the petitioner's likelihood of success on the merits of the appeal, (2) whether irreparable injury will occur absent a stay, and (3) whether the balancing of the equities supports temporary relief preserving the status quo during the appeal. *See Abbott v. Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) (stay appropriate where "there [was] some likelihood that plaintiffs would have prevailed on appeal and thus been irreparably injured"); *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19, 493 S.E.2d 806, 809–11 (1997) (stay appropriate where failure to stay enforcement "would work a substantial injustice"); *see also N. Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009). Here, each of these factors favors the grant of a temporary stay and writ of supersedeas preserving the status quo pending appeal.

I. LEGISLATIVE DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS.

Legislative Defendants are likely to succeed on the merits of their appeal for no fewer than *six* independent reasons, any of which is dispositive. *First*, because Plaintiffs assert facial challenges to the election laws at issue, the single-judge Superior Court did not have jurisdiction to consider their claims. *See Grady*, 372 N.C. at 522; N.C. GEN. STAT. §§ 1A-1, Rule 42, 1-81.1(a1), 1-267.1(a1). *Second*, Legislative Defendants are necessary parties to any consent judgment in this case under state law, N.C. GEN. STAT. § 120-32.6(b), and because they do not consent, the consent judgment must be vacated. *Third*, the consent judgment is illegal because it violates the federal Constitution's Elections Clause and Equal Protection Clause. *Fourth*, the consent judgment is not "fair, adequate, and reasonable," *North Carolina*, 180 F.3d at 581, because the Plaintiffs were unlikely to succeed on the merits of their claims and the relief contemplated by the consent judgment is vastly disproportionate to the expected harm. *Fifth*, the consent judgment is against the public interest. And *sixth*, the evidence indicates that the consent judgment is a product of collusion, not an arm's length agreement between Plaintiffs and the NCSBE.

In considering whether to enter a consent judgment, a court must examine it "carefully" to ensure that its terms are "fair, adequate, and reasonable." *United States v. City of Miami*, 664 F.2d 435, 440–41 (5th Cir. 1981) (en banc) (Rubin, J., concurring). The court also "must ensure that the agreement is not illegal, a product of collusion, or against the public interest." *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). Examination of a plaintiff's likelihood of success on the merits

is a necessary component to consideration of whether a consent judgment should enter. In fact, the merits are "[t]he most important factor" in determining whether the consent judgment is fair, adequate, and reasonable. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). The Court must "consider[] the underlying facts and legal arguments" that support or undermine the proposal. *United States v. BP Amoco Oil*, 277 F.3d 1012, 1019 (8th Cir. 2002). While courts need not conduct a full-blown trial, they must "reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.'" *Flinn*, 528 F.2d at 1173. A lower court's decision to accept or reject a consent judgment is reviewed for abuse of discretion. *See North Carolina*, 180 F.3d at 577, 581. "However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—[this Court] conduct[s] de novo review." *Da Silva v. WakeMed*, 846 S.E.2d 634, 638 (N.C. 2020). Furthermore, "an error of law is an abuse of discretion." *Id.* at 638 n.2. As explained below, because the consent judgment here cannot meet the standards necessary for its entry, the Superior Court erred as a matter of law and abused its discretion in entering it.[1]

[1] While Legislative Defendants recognize that this Court's authority to enter a consent judgment is governed by State, not federal, law, Legislative Defendants' citations to federal cases as persuasive authority on this point are appropriate given the lack of authoritative precedent from the North Carolina courts in this area. *See N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt., LLC*, 836 S.E.2d 754, 758 (N.C. Ct. App. 2019) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance.").

A. The One-Judge Superior Court Did Not Have Jurisdiction To Enter The Proposed Consent Judgment Because Plaintiffs' Challenges To The Various Election Laws Are Facial.

Plaintiffs' attempt to use the courts to enact programmatic, substantial changes to North Carolina's election law was statutorily required to be heard before a three-judge panel of the Superior Court because Plaintiffs' claims are facial. *See* N.C. GEN. STAT. § 1-267.1(a1). In their Amended Complaint, Plaintiffs sought an order "permitting counties to expand the early voting days and hours during the pandemic," "suspending the Witness Requirement for single-person or single-adult households," "requiring the State to provide pre-paid postage on all absentee ballots and ballot request forms," "requiring 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," and allowing voters to obtain assistance from third parties in completing and submitting their absentee ballot applications and in delivering completed ballots to election officials. Am. Compl. ¶ 7. Plaintiffs explicitly sought this relief not only for themselves but also for "all other eligible North Carolinians." *Id.* ¶ 2. To the extent these claims seek relief for parties beyond the actual Plaintiffs in this case, they are facial in nature. *See Grady*, 372 N.C. at 546–47 (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)).

What is more, even if the facial nature of Plaintiffs' claims were not clear from the face of their complaint, it is clearly established by the relief contained in the consent judgment, which is to be effectuated through the issuance of Numbered Memos to all 100 county boards of elections throughout the state. *See* Stipulation and Consent Judgment at 15–17, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*,

No. 20 CVS 8881 (Wake Cnty. Super. Ct. Oct. 2, 2020) ("Consent Judgment") (attached as Doc. Ex. 29). Indeed, two limitations on the relief sought that Plaintiffs seized upon to assert that their claims are as applied—the limitation of the challenge to the witness requirement to individuals who do not reside with another adult and the limitation of the challenge to the ballot receipt deadline to ballots sent through the U.S. Postal Service ("USPS"), *see* Plaintiffs' Response to Intervenor-Defendants' Motion & Cross-Motion for Recommendation for Rule 2.1 Designation at 3 (Aug. 24, 2020) (attached as Doc. Ex. 69)— disappeared in the consent judgment. Plaintiffs and the NCSBE instead agreed to relieve *all* voters of the necessity of complying with the witness requirement and extended the receipt deadline for *all* ballots sent out for delivery by election day, whether through the USPS or a commercial carrier. *See* Consent Judgment at 15–16. The attempted evisceration of the one-witness requirement is particularly indicative of the facial nature of Plaintiffs' claims, as that relaxed witness requirement applies *only* to this November's election. *See* HB1169 § 1.(a).

Further demonstrating the facial nature of the consent judgment is the fact that the NCSBE's actions apparently are meant to settle not only this lawsuit but also two others that *Judge Collins himself* found to raise facial challenges—*Chambers v. State*, No. 20 CVS 500124, and *Stringer v. N.C. State Bd. of Elections*, No. 20 CVS 5615. *See* NCSBE Bench Memo at 5–7 (Sept. 15, 2020) (attached as Doc. Ex. 76). Indeed, the consent judgment must be intended to buy NCSBE global peace, otherwise it could not possibly achieve its purported objective "to avoid any continued

uncertainty and distraction from the uniform administration of the 2020 elections." Consent Judgment at 15.

For the foregoing reasons, a one-judge Superior Court lacked jurisdiction to enter the consent judgment, and this Court must therefore vacate it.

B. The Consent Judgment Must Be Vacated Because Legislative Defendants' Consent, A Necessary Component, Is Lacking.

Legislative Defendants intervened as of right in this case as agents of the State on behalf of the General Assembly under N.C. GEN. STAT. §§ 1A-1, Rule 24, 1-72.2(b), and 120-32.6(b). Legislative Defendants are "necessary parties" in every case in which "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," and "in such cases, . . . possess final decision-making authority with respect to the defense of the challenged act . . . or provision of the North Carolina Constitution." *Id.* § 120-32.6(b). Legislative Defendants represent not only the interests of the State in defending its democratically enacted laws, *see Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013); *Karcher v. May*, 484 U.S. 72, 82 (1987), but also the interest of the General Assembly itself in defending the constitutionality of the challenged election law provisions, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803–04 (2015); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019). Consequently, these provisions mandate that any consent judgment cannot enter without the consent of Legislative Defendants. *Cf. Guilford Cnty v. Eller*, 146 N.C. App. 579, 581, 553 S.E.2d 235, 236 (2001) ("It is well-settled that the power of the court to sign a consent judgment depends upon the unqualified

consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment." (cleaned up)). Indeed, entering a consent judgment over the objection of Legislative Defendants would represent an end-run around the statutes making Legislative Defendants a necessary party to this case and giving them primacy in the defense of state laws from constitutional attack. Because Legislative Defendants have not given consent here, the consent judgment must be vacated.

Judge Collins concluded that N.C. GEN. STAT. § 163-22.2 gives the NCSBE authority to settle this case without Legislative Defendants' consent, but it does no such thing. That statute provides that when an election law is "held unconstitutional" the NCSBE has limited authority to make rules that "do not conflict with any provisions of this Chapter 163 of the General Statutes." N.C. GEN. STAT. § 163-22.2. It then provides that the NCSBE "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." *Id.* (emphasis added). Read in context, there thus are at least two conditions to settlement under § 163-22.2 that are not met here: (1) a court must have held a state election law unconstitutional; and (2) the proposed settlement must not conflict with any provisions of Chapter 163. *See* Order at 79, *Moore*. In addition, given Legislative Defendants' final decision-making authority in this litigation, the Attorney General cannot lawfully recommend a settlement without Legislative Defendants' consent.

C. The Consent Judgment Must Be Vacated Because It Is Unconstitutional.

The consent judgment undermines North Carolina's election statutes and effectively nullifies statutes enacted by the General Assembly while depriving the State of its ability to "enforce its duly enacted" laws. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). It violates two provisions of the federal Constitution that protect North Carolina's elections and the right to vote: the Elections Clause and the Equal Protection Clause.

1. The Consent Judgment Violates The Elections Clause.

The text of the Elections Clause is clear: "[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. I, § 4, cl. 1 (emphasis added). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Neither the NCSBE nor this Court have the authority to override the General Assembly's exercise of this authority through the consent judgment. The consent judgment is unconstitutional, therefore, because it overrules the enactments of the General Assembly to regulate the times, places, and manner of holding the upcoming federal election.

The General Assembly is the "Legislature," established by the people of North Carolina. N.C. CONST. art. II, § 1. And the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he

legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016). With this grant of exclusive legislative power, the General Assembly is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the State. N.C. CONST. art. I, § 6. Concurrently, this exclusive grant of legislative power means the U.S. Constitution has assigned the role of regulating federal elections in North Carolina to the General Assembly. By choosing to use the word "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch, *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814, and in North Carolina that is the General Assembly.

The Elections Clause thus mandates that the General Assembly is the only constitutionally empowered state entity to regulate federal elections. And as the U.S. Supreme Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—the state legislatures' power to prescribe regulations for federal elections "cannot be taken." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And courts have long recognized this limitation on the power of states to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *Commonwealth ex rel. Dummit*

v. O'Connell, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

The NCSBE has clearly violated the Elections Clause by issuing numbered memoranda to effectuate the consent judgment that purport to adjust the rules of the election that have already been set by statute, and the Superior Court did the same by entering the consent judgment. Neither the NCSBE nor the Superior Court have freestanding power under the United States Constitution to rewrite North Carolina's election laws and to "prescribe[]" their own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. The North Carolina Constitution is fully consistent with this mandate and states that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1, and it makes clear that "[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other, *id.* art. I, § 6. And where there is an exception to this separation, it is expressly indicated, *see id.* art. IV, § 1 ("The judicial power of the State shall, *except as provided in Section 3 of this Article*"—addressing administrative agencies—"be vested in a Court for the Trial of Impeachments and in a General Court of Justice." (emphasis added)). Thus, neither the NCSBE nor the Superior Court are the "Legislature" empowered to adjust the rules of the federal election on their own. *See League of Women Voters of Mich. v. Benson*, No. 17-cv-14148, 2019 U.S. Dist. LEXIS 228463, at *10 (E.D. Mich. Feb. 1, 2019) (declining to enter a consent decree in a partisan gerrymandering case between the League of Women Voters and the Secretary of State because only the Michigan Legislature had

authority to regulate the time, place, and manner of elections). What is more, "the 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." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978).

Because the People of North Carolina have not granted legislative power to the NCBSE or the Superior Court, this case is far afield from *Arizona Independent Redistricting Commission*. In that case, the Supreme Court dealt with a provision of the Arizona Constitution—adopted through popular initiative—that vested an independent state commission with authority over drawing federal congressional districts. The state legislature claimed that the federal Elections Clause rendered that allocation of authority invalid, but the Supreme Court disagreed, concluding that the independent state commission simply acted as "a coordinate source of legislation on equal footing with the representative legislative body." *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 795. But here neither the NCSBE nor this Court have legislative power and are not on equal footing with the General Assembly. Indeed, the North Carolina Supreme Court expressly held that a prior version of the NCSBE "clearly performs primarily executive, rather than legislative or judicial, functions." *Cooper v. Berger*, 370 N.C. 392, 415, 809 S.E.2d 98, 112 (2018). And it made clear that whatever "interstitial" policy decisions the NCSBE can make, it cannot "make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations." *Id.* at 415 n.11. It therefore struck down

provisions limiting the Governor's control over the NCSBE. The current version of the statute does not change the nature of the NCSBE's activities but rather addresses the constitutional infirmities recognized by *Cooper*. *Compare id.* at 418–19, *with* N.C. GEN. STAT. § 163-19.

Even if it were possible in some circumstances for an executive agency like the NCSBE to exercise the authority to prescribe regulations governing the times, places, and manner of federal elections that the Elections Clause assigns exclusively to the legislature (and it is not), the NCSBE would lack authority to do so here. The NCSBE is a creature of statute. *See* N.C. GEN. STAT. § 163-19(a) ("There is established the State Board of Elections . . . ."). And consistent with being a creature of statute, the NCSBE is limited by the statute that created it. "The State Board of Elections shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations . . . as it may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See id.* § 163-22(a) (emphasis added). Thus, the General Assembly has not granted the NCSBE any power to overrule the duly enacted statutes governing elections or given it any form of legislative power. Quite the contrary, the NCSBE is not allowed to issue any rules or regulations that "conflict" with provisions enacted by the General Assembly.

To be sure, Executive Director Bell has limited statutory authority to make necessary changes to election procedures "where the normal schedule for the election is disrupted by . . . a natural disaster." N.C. GEN. STAT. § 163-27.1. Here, the normal

schedule for the election has not been disrupted. And the current pandemic is not a "natural disaster" under the statute and its implementing regulations "describing the emergency powers and the situations in which the emergency powers will be exercised," *id.*; *see* 8 N.C. ADMIN. CODE 1.0106, and the North Carolina Rules Review Commission unanimously rejected an earlier attempt by Executive Director Bell to extend her emergency powers to the pandemic, *see* Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/3kLAY5y (attached as Doc. Ex. 91). In declining to approve the changes to the Rule, the Rules Review Commission explained that the NCSBE "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. *Id.*; *see also* Order at 80–85, *Moore*. What is more, in enacting HB1169, the General Assembly already decided what adjustments to the election laws are necessary to account for the pandemic.

The consent judgment replaces the judgment of the General Assembly with that of the NCSBE. But "consent is not enough when litigants seek to grant themselves power they do not hold outside of court." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. Thus, because the consent judgment purports to alter the time, place, and manner for holding the upcoming federal election in a manner that contravenes the General Assembly's duly enacted statutes, its entry would violate the Elections Clause.

2. The Consent Judgment Violates The Equal Protection Clause.

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 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). But the right to vote includes the right to have one's ballot counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted).

To ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000); *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 v. Sanders*, 372 U.S. 368, 380 (1963) ("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."). "[T]reating voters different" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001).

At a minimum then, the Equal Protection Clause requires the "nonarbitrary treatment of voters" and forbids voting practices that are "standardless," without

"specific rules designed to ensure uniform treatment." *Bush*, 531 U.S. at 103, 105–06; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). Consequently, the "formulation of uniform rules" is "necessary" because the "want of" such rules may lead to "unequal evaluation of ballots." *Bush*, 531 U.S. at 106.

As two federal courts in *Moore* held was likely the case, Mem. Op. & Order at 57, *Moore*; Order at 11–16, *Moore*, aspects of the consent judgment likely violate these constitutional requirements, thereby infringing on the Equal Protection rights of those 153,664 North Carolina voters who had already cast their absentee ballots before the consent judgment was announced[2] to "participate in" the upcoming election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336. The consent judgment also violates the Equal Protection right of all North Carolina voters to have their ballots counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29.

i. The Consent Judgment Subjects Voters In The Same Election To Different Regulations.

First, the consent judgment has caused North Carolina to administer its election in an arbitrary fashion pursuant to nonuniform rules that cause the unequal evaluation of ballots. Indeed, the district court in the *Moore* litigation found that two of the policies reflected in the consent judgment "appear to be clear violations" of the Equal Protection Clause's prohibition of arbitrary and disparate treatment of voters, the evisceration of the witness requirement and the Receipt Deadline Extension. *See*

[2] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 21, 2020), *available at* https://bit.ly/33SKzAw.

Order at 3, 53–59, *Moore*. While the evisceration of the witness requirement has now been enjoined by a federal court, the controversy over the Receipt Deadline Extension is still live.

The consent judgment allows absentee ballots to be received up to *nine days* after election day. Consent Judgment at 15, 26. This is both in violation of the General Assembly's duly enacted statutes and a change in the rules while voting is ongoing.

The consent judgment also provides a standardless approach by allowing even the anonymous delivery of ballots—facilitating violations of N.C. GEN. STAT. § 163-226.3's prohibition on the delivery of ballots by all but a select few—to unmanned boxes at polling sites. Consent Judgment at 36–40.

Accordingly, under the consent judgment, North Carolina will necessarily be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. *See Bush*, 531 U.S. at 106. Over 150,000 voters cast their ballots before the consent judgment was unveiled, and therefore worked to comply with the receipt deadline and lawful delivery requirements. There is no justification for subjecting North Carolina's electorate to this arbitrary and disparate treatment.

ii. The Consent Judgment Will Dilute Lawfully Cast Votes.

Second, under the consent judgment the NCSBE will be violating North Carolina voters' rights to have their votes counted without dilution. *Reynolds*, 377 U.S. at 555 n.29. Even after the federal court injunction against evisceration of the witness requirement, the consent judgment ensures that votes that are invalid under

the duly enacted laws of the General Assembly *will* be counted in three ways: (1) by allowing absentee ballots to be counted if received up to nine days after election day, *see id.* at 26–27; (2) by allowing absentee ballots without a postmark to be counted in certain circumstances if received after election day, *id.*; and (3) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see id.* at 36–40. These changes are open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the votes of North Carolina voters.

The consent judgment is a denial of the one-person, one-vote principle affixed in the Supreme Court's jurisprudence. Dilution of lawful votes, to any degree, by the casting of unlawful votes violates the right to vote and the Fourteenth Amendment. *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Thus, when the NCSBE purposely accepts otherwise late ballots beyond the deadline set by the General Assembly, or facilitates the delivery of ballots by unlawful parties, the NCSBE has accepted votes that dilute the weight of lawful North Carolina votes.

* * *

Accordingly, under the consent judgment, the NCSBE will be violating the Equal Protection Clause in two separate ways: it will be administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast their absentee ballots before the consent judgment was announced "to participate in" the election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336; and it will also be purposefully allowing otherwise unlawful votes to be

counted, thereby deliberately diluting and debasing North Carolina voters' votes. These are clear violations of the Equal Protection Clause.

D. The Consent Judgment Must Be Vacated Because It Is Not Fair, Adequate, And Reasonable.

The consent judgment must be vacated because it is not fair, adequate, and reasonable. Here, because Plaintiffs were unlikely to succeed on the merits of their claims, and because the relief afforded by the consent judgment is vastly disproportionate to the purported harm, the consent judgment is not fair, adequate, and reasonable, and must be vacated.

1. Plaintiffs' Claims Were Unlikely To Succeed On The Merits.

Plaintiffs' legal theories, evidence, and expert reports have significant weaknesses that rendered their claims unlikely to succeed on the merits. Each will be discussed in turn below.

i. Plaintiffs Cannot Possibly Succeed In Showing That The Challenged Statutes Are Unconstitutional In All Of Their Challenged Applications.

As explained above, Plaintiffs' claims—particularly viewed in light of the consent judgment—are facial. But regardless of whether the Court agrees with that characterization, to succeed Plaintiffs must demonstrate that the challenged provisions are unconstitutional *in all the applications for which Plaintiffs seek to have them invalidated.* For these purposes, "the label is not what matters and to the extent that a claim and the relief that would follow reach beyond the particular circumstances of the party before the court, the party must satisfy [the] standards for a facial challenge to the extent of that reach." *Grady*, 372 N.C. at 547 (cleaned up)

(citing *Doe*, 561 U.S. at 194). It is well established that "[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 138, 814 S.E.2d 43, 47 (2018) (internal quotation marks and brackets omitted), *aff'd*, 139 S. Ct. 2213 (2019). Under this "exacting standard," *id.*, therefore, Plaintiffs "must establish that [the challenged provisions are] unconstitutional in all of [their challenged] applications" during the COVID-19 pandemic. *Grady*, 372 N.C. at 522 (internal quotation marks omitted). Plaintiffs do not even seriously attempt to carry their burden of showing that *all* challenged applications of the challenged provisions are unconstitutional during the pandemic.

As will be explained below, Plaintiffs cannot even credibly demonstrate that *they themselves* are meaningfully injured by North Carolina's generous early voting opportunities, by the requirement to find a single witness, by having to pay the postage for mailing a completed ballot, by the speculative possibility that the delivery of their ballots might suffer from a mail delay, and by the prohibition on third-party ballot harvesting. Indeed, at least five of the seven individual Plaintiffs—Tom Kociemba, Rosalyn Kociemba, Rebecca Johnson, Barker Fowler, and Sandra Malone—***have already voted***.[3] They certainly have not established that these

[3] *See* Thomas John Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 340); Rosalyn Cotter Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 342); Rebecca Kay Johnson, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 345);

measures impose an unconstitutional burden in every circumstance. Plaintiffs have not established that the risk of polling place consolidation or reduced hours is so dire that it has imposed unconstitutional burdens on *all* in-person voters, and even if "crowds and long lines" occur at some voting locations, Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Pls.' Mem.") at 36 (Sept. 4, 2020) (attached as Doc. Ex. 281), that will obviously not be the case everywhere, so Plaintiffs' facial challenge must fail as a matter of law.

Neither can Plaintiffs carry their burden of showing that all applications of the witness requirement are unconstitutional during the pandemic, even if the analysis is limited to those who do not live with another adult (a limitation on the reach of Plaintiffs' claim that has disappeared in the consent judgment). Indeed, as explained below, each of the individual voters deposed who allege they live alone and are concerned about complying with the witness requirement admitted to one or more of the following: (1) having regular contact with other individuals outside their home since March 2020, (2) having someone they could ask to witness their ballot, or (3) even having already made arrangements for a witness. *See infra* Part I.D.1.vi.c. And presumably these voters were chosen to participate in this lawsuit because they are isolating themselves more than the typical voter. Plaintiffs make no effort to establish the number of voters who live alone but nonetheless would have essentially zero burden to comply with the witness requirement, such as those who attend a physical

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Susan Barker Fowler Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 1163); Sandra Jones Malone Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 1166).

school, go to a workplace, or frequently visit in person with family and friends. The witness requirement cannot possibly be unconstitutional in these applications. As for the necessity of paying postage to mail a completed ballot, it simply cannot be maintained that having to purchase a single 55-cent stamp unconstitutionally burdens the right to vote of every absentee voter in the State, especially since ballots can be dropped off in person and voters can vote in person. Nor do Plaintiffs provide any credible explanation supporting the notion that every voter who chooses to vote by mail will face difficulty returning their ballot in time—it is self-evident that those who have already voted have had their ballots returned on time, for example. Only those who wait to the last minute even have a theoretical concern about an alleged slowdown in mail delivery. And Plaintiffs fail to establish that the prohibition on ballot harvesting unconstitutionally burdens all absentee voters, as many North Carolinians will not be burdened in the slightest by the ban.

As Justice Stevens explained in his controlling opinion in *Crawford v. Marion Cnty Election Bd.*, 553 U.S. 181 (2008), *see Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1222 n.31 (11th Cir. 2020), even if a "neutral, nondiscriminatory regulation of voting procedure" creates "an unjustified burden on *some voters*," the "proper remedy" is not "to invalidate the entire statute," *Crawford*, 553 U.S. at 203 (controlling opinion of Stevens, J.) (emphasis added). But the kind of improper remedy condemned by Justice Stevens in *Crawford* is precisely what Plaintiffs seek here. Plaintiffs' challenges thus are doomed to fail.

ii. Plaintiffs' Challenges Violate The *Purcell* Principle.

The U.S. Supreme Court, invoking its decision in *Purcell v. Gonzalez*, "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). That is because "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). For example, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that will increase "[a]s an election draws closer." *Purcell v. Gonzalez*, 549 U.S 1, 4–5 (2006) (per curiam).

Even if Plaintiffs are correct that the challenged provisions violate the State Constitution, this Court must vacate the consent judgment, which disrupts the State's upcoming elections. *See, e.g.*, *Tex. All. for Retired Ams. v. Hughs*, No. 20-40643, 2020 WL 5816887, at *1 (5th Cir. Sept. 30, 2020) (per curiam) (attached as Doc. Ex. 349) (staying a district court order, on *Purcell* grounds, that changed election laws eighteen days before early voting was set to begin). "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds*, 377 U.S. at 585. Here, equity favors judicial modesty.

"Time and time again over the past several years, the Supreme Court has stayed lower court orders that change election rules on the eve of an election." *Tex.*

All. for Retired Ams., 2020 WL 5816887, at *1; *see, e.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower court order that changed election laws thirty-three days before the election); *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014) (staying a lower court order that changed election laws sixty days before the election); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (denying application to vacate court of appeals' stay of district court injunction that changed election laws on eve of election); *Purcell*, 549 U.S. 1 (staying a lower court order changing election laws twenty-nine days before the election). The reasons animating the *Purcell* principle apply with full force here. First, the consent decree conflicts with recent federal court and state court decisions to uphold the very same provisions against similar federal and state constitutional challenges. *See* Order on Inj. Relief, *Chambers* (rejecting motion to enjoin witness requirement); *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103, *136–45 (rejecting motion to enjoin the witness requirement and require contactless drop boxes). Second, the election has already started, election day is merely 13 days away, and "important, interim deadlines that affect Plaintiffs . . . and the State" have already passed. *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020). In particular, absentee ballots were made available to voters on September 4, *see* N.C. GEN. STAT. § 163-227.10(a), and as of October 21, 2020, nearly 1.4 million absentee ballots have been requested and over 2.1 million voters have already cast their absentee ballots.[4] Moreover, counties have already set

[4] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 21, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 20, 2020).

their one-stop early voting schedules and early voting has begun.[5] The consent judgment, by changing the challenged provisions now—when hundreds of thousands of absentee ballots have already been sent to voters and early voting has already started—will surely cause massive confusion and consume administrative resources.

In short, the consent judgment is entirely impractical—indeed, affirmatively harmful—because it occurs mid-stream in the middle of an ongoing election and weeks away from election day. Under the logic of *Purcell*, this reason alone should be sufficient to deny their motion.

iii. Plaintiffs Failed To Exercise Appropriate Dispatch In Raising Their Challenges.

"Equity demands that those who would challenge the legal sufficiency of [legislative] decisions concerning time sensitive public [decisions] do so with haste and dispatch" in particular. *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989); *see also N. Iredell Neighbors for Rural Life*, 196 N.C. App. at 79 (affirming denial of injunction when "some two months elapsed without any contention by plaintiffs of an urgent threat of irreparable harm" (brackets omitted)). Here, Plaintiffs did not file their initial complaint until August 10, 2020—nearly five months after the NCSBE's Executive Director raised the potential need for legislative reform to address the impact of the pandemic on the State's elections (including specifically the witness requirement, prepaid return postage for completed absentee ballots, and early voting restrictions) and nearly two months after HB1169 was

[5] *See Vote Early In-Person*, N.C. STATE BD. OF ELECTIONS (Oct. 20, 2020), https://bit.ly/2Geq3ms.

enacted. Worse still, Plaintiffs did not file their motion for entry of the consent decree until September 22—over a month after they initiated suit. Indeed, "Plaintiffs have in some respects created the need for the emergency relief" by "wait[ing] more than three months to file this action." *Kishore v. Whitmer*, No. 20-1661, 2020 U.S. App. LEXIS 26827, at *11 (6th Cir. Aug. 24, 2020); *see also Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., joined by Alito, Gorsuch, Kavanaugh, JJ., concurring in the grant of stay) (faulting a party seeking emergency injunctive relief against a state's election law for "delay[ing] unnecessarily its pursuit of relief" (internal quotation marks omitted)).

Plaintiffs could have easily challenged the various election policies and requirements at issue before August 10. The provisions existed—some of them in a more restrictive form—long before the pandemic began. And even after the pandemic hit the State, Plaintiffs clearly delayed in filing their complaint. Contrast their suit with the similar federal challenge in *Democracy North Carolina v. North Carolina State Board of Elections*. There, the plaintiffs filed their complaint on May 22, 2020, *see Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *11, nearly three months before Plaintiffs here, and moved for a preliminary injunction on June 5, 2020—three months before the September 4 deadline for releasing absentee ballots. Plaintiffs also are represented by the same counsel that represent the plaintiffs in the *Stringer v. N.C. State Bd. of Elections*, No. 20 CVS 5615 (Wake Cnty. Super. Ct.), case, which raises similar claims but was filed in May. Plaintiffs here had no legitimate reason for not acting sooner than they have.

And although Plaintiffs had ample opportunity to file for relief at an earlier date, their delay has put the State in an untenable position. The State will have to expend significant administrative resources informing voters of the new election procedures under the consent judgment, likely causing massive confusion. This Court should not reward Plaintiffs' delay by affirming the consent judgment.

iv. Plaintiffs' Challenges Second-Guessing State Officials' Responses To The Pandemic Are Not Appropriate.

"Under the Constitution, state and local governments . . . have the primary responsibility for addressing COVID-19 matters such as . . . adjustment of voting and election procedures . . . ." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2614 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief). As the passage of HB1169 demonstrates, North Carolina legislators acted to adapt the State's election laws to account for the COVID-19 pandemic. Moreover, these elected officials are far better positioned than a court to assess the balance of benefits and harms that are likely to result from altering the State's election regulations in the final months before a general election. Indeed, such assessments require officials "to act in areas fraught with medical and scientific uncertainties," where "their latitude must be especially broad," and not "subject to second-guessing by" judges who "lack[] the background, competence, and expertise to assess public health." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted). North Carolina officials have not been sitting idly by; they are actively and diligently seeking to

accommodate both the State's interests and their voters' interests, all while reacting to the ever-changing effects of COVID-19 on daily life.

The COVID-19 pandemic has not given judges "a roving commission to rewrite state election codes." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020). For this reason, the Supreme Court has shown enormous deference to State election officials during the COVID-19 pandemic. The Court on several occasions during the pandemic has refused to vacate courts of appeals' stays of lower-court preliminary injunctions affecting elections. *See, e.g.*, *id.* at 412 (staying injunction against Texas absentee ballot restrictions), *application to vacate stay denied*, 140 S. Ct. 2015 (2020) (mem.); *Thompson*, 959 F.3d 804 (staying injunction against Ohio initiative signature requirements), *application to vacate stay denied*, No. 19A1054, 2020 U.S. LEXIS 3376 (U.S. June 25, 2020) (mem.). And it has on even more occasions *granted* stays of lower-court preliminary injunctions that have attempted to change electoral rules in light of the pandemic. *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. 1205 (staying injunction against requirement that absentee ballots be postmarked by election day); *Little*, 140 S. Ct. 2616; *Clarno v. People Not Politicians Or.*, No. 20A21, 2020 U.S. LEXIS 3631 (U.S. Aug. 11, 2020) (mem.) (staying injunction against initiative signature requirement); *Merrill v. People First of Ala.*, No. 19A1063, 2020 U.S. LEXIS 3541 (U.S. July 2, 2020) (mem.) (staying injunction against absentee ballot witness requirement). The Supreme Court's conclusion that these injunctions were not justified by the pandemic undermines Plaintiffs' likelihood of success on the merits.

v. Plaintiffs' Challenges Related To Absentee Voting Are All Subject To Rational-Basis Review.

All of Plaintiffs' claims challenge aspects of absentee voting—whether limitations on one-stop early voting (a form of absentee voting) or absentee voting by mail. Plaintiffs assert that the challenged provisions "unconstitutionally burden the right to vote" because they violate the North Carolina Constitution's guarantees of the freedom of assembly, the freedom of speech, and equal protection. Pls.' Mem. at 30; *see also* N.C. CONST. art. I, §§ 12, 14, 19. In assessing the merit of this claim, the Court must first ascertain the proper level of scrutiny for reviewing the election policies and requirements at issue. Plaintiffs contend that "[b]ecause [their] claims implicate the fundamental right to vote on equal terms, and the challenged provisions burden constitutionally-protected speech and political association, strict scrutiny applies." Pls.' Mem. at 31. This assertion is meritless.

The view that *all* restrictions on the right to vote are subject to strict scrutiny is plainly foreclosed by precedent. *See Burdick v. Takushi*, 504 U.S. 428, 432 (1992) ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."). In *Libertarian Party of North Carolina v. State*, 365 N.C. 41, 707 S.E.2d 199 (2011), this Court—following the United States Supreme Court's lead—explained that "requiring 'every voting, ballot, and campaign regulation' to meet strict scrutiny 'would tie the hands of States seeking to assure that elections are operated equitably and efficiently,'" *id.* at 50 (quoting *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S.

182, 206 (1999) (Thomas, J., concurring)). "Hence, strict scrutiny is warranted only when [the] right [asserted] is *severely burdened*." *Id.* (emphasis added).

Having established that strict scrutiny cannot be reflexively applied in the electoral context, the question remains of how to assess the constitutionality of the challenged provisions. Although Plaintiffs do not even consider the possibility that rational-basis review may apply to their vote-burdening claims, a careful review of the case law reveals that to be the case. For starters, it is well established that "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Burdick*, 504 U.S. at 433 (explaining that the right to vote does not entail an absolute right to vote in any particular manner).

Indeed, although this Court long ago held that the North Carolina Constitution does not *preclude* the General Assembly from permitting absentee voting, *see Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 349 (1920), no court in this State has ever held that the North Carolina Constitution *requires* the option of absentee voting. And because there is no constitutional right to cast an absentee ballot, burdens imposed on one's ability to vote absentee are reviewed under heightened scrutiny only in narrowly confined circumstances.

On this score, the Supreme Court's decision in *McDonald v. Bd. of Election Comm'ners of Chicago*, 394 U.S. 802 (1969), is instructive. *See Libertarian Party of N.C.*, 365 N.C. at 47–53 (adopting the United States Supreme Court's construction of the Federal Constitution for evaluating state constitutional challenges to election law); *see also State v. Hicks*, 333 N.C. 467, 484, 428 S.E.2d 167, 176 (1993)

("We . . . give great weight to decisions of the Supreme Court of the United States interpreting provisions of the Constitution which are parallel to provisions of the State Constitution to be construed."). In *McDonald*, the Court explained that restrictions on absentee ballots are reviewed only for rationality unless the putative voter is "in fact *absolutely prohibited* from voting by the State" when looking at the state's election code "as a whole." *Id.* at 807–08 & n.7 (emphasis added). That is because there is a fundamental difference between "a statute which ma[kes] casting a ballot easier for some who were unable to come to the polls" and a "statute absolutely prohibit[ing]" someone "from exercising the franchise." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Goosby v. Osser*, 409 U.S. 512, 521–22 (1973) (striking down an absentee ballot restriction only because the state's statutory scheme "absolutely prohibit[ed]" incarcerated prisoners from voting by other means).

Earlier this year, the Fifth Circuit relied on *McDonald* and its progeny to reaffirm that state regulations of absentee ballots should be examined under rational basis review. In *Texas Democratic Party v. Abbott*, a motions panel of the Fifth Circuit determined that challenges to Texas's statutory scheme were unlikely to succeed on the merits even though Texas provides absentee ballots only to a few limited classes of voters such as those over the age of 65 or those suffering from disabilities. 961 F.3d at 407. The court explained that in *McDonald*, the Supreme Court held that where a state statute "burden[s] only [an] asserted right to an absentee ballot," it is subject only to rational-basis review unless the plaintiff can produce "evidence that the state

would not provide them another way to vote." *Id.* at 403. And as the Fifth Circuit further explained, although COVID-19 "increases the risks of interacting in public," under *McDonald*, state laws limiting access to absentee ballots do not violate the Constitution unless the State itself has "'in fact absolutely prohibited' the plaintiff from voting" and COVID-19 is "beyond the state's control." *Id.* at 404–05 (quoting *McDonald*, 394 U.S. at 808 n.7); *see also Thompson*, 959 F.3d at 810 (emphasizing that courts "cannot hold private decisions to stay home for their own safety against the State"). North Carolina "permits the plaintiffs to vote in person; that is the exact opposite of absolutely prohibiting them from doing so." *Tex. Democratic Party*, 961 F.3d at 404 (internal quotation marks and brackets omitted).[6]

Therefore, "*McDonald* directs [this Court] to review [North Carolina absentee-ballot laws] only for a rational basis." *Id.* at 406. That review demands only that the challenged provisions "bear some rational relationship to a legitimate state end." *Id.* Under this general standard, the Fifth Circuit found that Texas's restrictions on absentee voting were rationally related to the State's interest in deterring voter fraud and preserving efficient, orderly election administration. *See id.* at 406–08.

If Texas's absentee balloting regime satisfies rational-basis review, then North Carolina's far less restrictive regime is necessarily constitutional. *Any* North Carolinian eligible to vote at the polls is eligible to vote by absentee ballot; the State

[6] Although the later merits panel in *Texas Democratic Party* was "hesitant to hold that *McDonald*" applied to plaintiffs' claims challenging Texas's regulations of absentee ballots, it nonetheless made "clear" that it was "not stating, even as *dicta*, that rational basis scrutiny is incorrect." *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 U.S. App. LEXIS 28799, at *54 (5th Cir. Sept. 10, 2020). The original opinion therefore remains persuasive and has not been repudiated.

does not restrict absentee voting to only certain classes of voters. And in North Carolina, any prospective voter can obtain an absentee ballot and the State has provided trained personnel to safely serve as witnesses for voters who require them. *See* N.C. GEN. STAT. §§ 163-226(a), 163-226.3(c). Under the rational-basis standard, the challenged provisions come to this Court "bearing a strong presumption of validity," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and the Court must uphold it against constitutional challenge so long as it "can *envision* some rational basis for the classification." *Huntington Props., LLC v. Currituck Cnty.*, 153 N.C. App. 218, 231, 569 S.E.2d 695, 704 (2002). And the burden here is not on the State to prove that the challenged provisions are constitutionally permissible but "on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). Plaintiffs do not and cannot come close to clearing this hurdle.

The State's "interest in ensuring orderly, fair, and efficient procedures of the election of public officials" is plainly legitimate. *Pisano v. Strach*, 743 F.3d 927, 937 (4th Cir. 2014). The absentee ballot receipt deadline, dates and times for one-stop early voting, and allocation of postage expenses to the voter are bread-and-butter administrative measures of the sort necessary to conduct an election in an orderly and efficient manner. And the witness requirement and the ballot harvesting ban are rational means of promoting the State's interest in deterring, detecting, and punishing voter fraud and in ensuring confidence in the integrity of elections, for when a voter comes to the polls, he or she must provide identifying information in the

presence of elections officials, but when would-be voters fill out a ballot remotely, there is no such check. This increases the risk of ineligible and fraudulent voting. *See, e.g.*, Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. And as the *Democracy N.C.* court pointed out, this potential for abuse has been a reality in North Carolina, particularly in the recently discovered "Dowless scandal," which took place over the course of the 2016 and 2018 elections and threatened the integrity of state and federal elections. That scandal also put into stark relief the risk that absentee balloting may present. That is also probably why a dozen States have adopted witness requirements of some form. *See VOPP: Table 14: How States Verify Voted Absentee Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2020), https://bit.ly/33LAqay. The challenged provisions are a rational means for ensuring that the absentee ballot was filled out by the person under whose name the vote will be counted. That is enough to satisfy rational-basis review.

vi. If The *Anderson-Burdick* Balancing Framework Applies, The Challenged Provisions Are Constitutional.

Even if Plaintiffs' challenge to the various election policies and requirements at issue were not subject to rational-basis review, the highest level of constitutional scrutiny Plaintiffs' claims could even conceivably merit is the standard known as the *Anderson-Burdick* analysis, which is taken from the United States Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and their progeny. This Court, considering a ballot-access challenge, explicitly adopted the *Anderson-Burdick* framework to govern voting-rights

challenges under the State constitution's equal protection, speech, election, and assembly clauses. *See Libertarian Party of N.C.*, 365 N.C. at 42; *see also James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005).

This approach recognizes that "[i]n the interest of fairness and honesty, the State "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder," and accordingly that "requiring every voting, ballot, and campaign regulation to meet strict scrutiny would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Libertarian Party of N.C.*, 365 N.C. at 49–50 (internal quotation marks omitted). Thus, under *Anderson-Burdick*, "requirements constituting an unreasonable, discriminatory burden are the only requirements subject to strict scrutiny review." *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000). For "reasonable and nondiscriminatory rules," the court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (internal quotation marks and brackets omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate, empirical verification." *Id.* (internal quotation marks omitted). Once the State's interests have been articulated, that is the end of the matter; there is no further analysis of "the extent to which the state's interests make it necessary to burden the plaintiff's rights." *Wood*, 207 F.3d at 716.

Under this framework, then, the first question is whether any of the measures Plaintiffs have challenged "severely burden" the right to vote. *Id.* None do.

a. Postage Expenses.

The requirement that voters bear their own postage—a single, 55-cent stamp—when choosing to return their completed ballot by mail is self-evidently a "reasonable, nondiscriminatory restriction[]." *Id.* (internal quotation marks omitted). The vast majority of states nationwide expect absentee voters to bear this minor, incidental expense. *See VOPP: Table 12: States with Postage-Paid Election Mail*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 14, 2020), https://bit.ly/3hSTFDm; Expert Affidavit of Dr. M.V. Hood, III, Ph.D. ("Hood Aff.") ¶¶ 38–39 (attached as Doc. Ex. 354). Plaintiffs' contention that purchasing a single 55-cent stamp imposes a "significant hurdle[] on North Carolinian's exercise of the franchise" is meritless, *id.* at 31. Indeed, in *Crawford* the U.S. Supreme Court found that Indiana's voter ID law failed to impose a severe burden on voting despite the fact that some voters may have been required to pay between $3 and $12 for a copy of their birth certificate in order to obtain a voter ID. *See* 553 U.S. at 199 n.17 (controlling opinion of Stevens, J.).

Courts have agreed that voters bearing their own postage expenses to submit their completed absentee ballots does not impose a severe burden on the right to vote, even in the context of the COVID-19 pandemic. In *DCCC v. Ziriax*, No. 20-cv-211, 2020 U.S. Dist. LEXIS 170427 (N.D. Okla. Sept. 17, 2020), the court found that postage "is a type of 'usual burden[] of voting,'" *id.* at *68 (quoting *Crawford*, 553 U.S. at 197–98), determined that "plaintiffs have not established that the lack of postage will result in disenfranchisement or an undue burden on any voter," and concluded that the burden the requirement imposed was "light," *id.* Furthermore, the court

determined that the policy of the USPS "is to deliver the ballot, irrespective of whether it has postage or not." *Id.* (Plaintiffs' expert Mayer confirmed that the USPS's policy is to "deliver absentee ballots without a stamp," and therefore that "in theory, [it] should be true" that "no one in North Carolina will be disenfranchised because they failed to put a stamp on their absentee ballot return envelope." Kenneth Mayer Expert Deposition Transcript at 106:2–14 (attached as Doc. Ex. 407). The District Court for the Northern District of Georgia recently rejected a similar claim under *Anderson-Burdick* and did not find a constitutional violation. *New Ga. Project v. Raffensperger*, No. 20-cv-1986, 2020 U.S. Dist. LEXIS 159901, at *63 (N.D. Ga. Aug. 31, 2020).

What little discovery Legislative Defendants have been able to conduct before Plaintiffs unilaterally shut down depositions in this case further undermines Plaintiffs' likelihood of success on the merits. With respect to concerns related to the delays in the postal service and lack of access to a stamp, each of the individual voters deposed before who plan to vote absentee admitted at least one of the following: (1) they have a stamp, *see* Rebecca Johnson Deposition Transcript ("Johnson Tr.") at 28:14–17 (attached as Doc. Ex. 553); Caren Rabinowitz Deposition Transcript ("Rabinowitz Tr.") at 32:24–25 (attached as Doc. Ex. 579); and (2) they could ask for a stamp or regularly frequent places that sell stamps, *see* Susan Barker Fowler Deposition Transcript ("Fowler Tr.") at 24:15–17 (attached as Doc. Ex. 612) (goes to grocery store); 24:18–19 (goes to drugstore); 24:22–23 (goes to gas stations); 25:20–22 (orders from Amazon); 32:13–15 (could ask parents for stamp).

b. Ballot Receipt Deadline.

Likewise, Plaintiffs cannot plausibly claim that North Carolina's deadline for receipt of completed absentee ballots somehow "severely burden[s]" the right to vote. *Libertarian Party of N.C.*, 365 N.C. at 51; *see also New Ga. Project v. Raffensperger*, No. 20-13360, at 2–3 (11th Cir. Oct. 2, 2020) (attached as Doc. Ex. 638) (staying district court injunction that extended Georgia's absentee ballot receipt deadline—7:00 p.m. on election day—because that deadline did not severely burden the right to vote); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 U.S. App. LEXIS 31950 (7th Cir. Oct. 8, 2020) (staying extension of Wisconsin's election day receipt deadline); *Common Cause of Ind. v. Lawson*, No. 20-2911, 2020 U.S. App. LEXIS 32259 (7th Cir. Oct. 13, 2020) (staying extension of Indiana's election day receipt deadline). Obviously, the need to fairly and expeditiously count the ballots and determine the election results necessitates *some* deadline for submitting absentee ballots; and North Carolina's cutoff—which allows ballots postmarked before the end of election day to come in up to three days later—is more generous than most. *See* Hood Aff. at 13 fig.2. While Plaintiffs complain about anticipated postal delays, it simply cannot be realistically denied that North Carolina's deadline gives absentee voters "ample opportunity"—alleged USPS delays and all—to get their votes in on time, and it therefore does not "burden[] them in any meaningful way." *Pisano*, 743 F.3d at 934–35. All Plaintiffs have to do is mail in their ballots far enough in advance of election day to ensure they are received on time—as Plaintiffs Johnson and Fowler have done. Presumably, a week in advance of election day would be enough, as that

would give their ballots more time to arrive than the relief they are seeking. That is precisely what the NCSBE is advising voters, both on its website and in the judicial voter guide sent to every household in the State. *See Detailed Instructions for Voting by Mail*, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2E4ZxL7 (last accessed Oct. 20, 2020); *Judicial Voter Guide 2020* at 14, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2EPP72k (last accessed Oct. 20, 2020) ("We strongly recommend mailing your completed ballot before October 27 for a timely delivery."). And this is leaving to the side the options of dropping off a ballot in person rather than sending it through the mail (as Plaintiffs Tom Kociemba, Rosalyn Kociemba, and Sandra Malone have done), or voting in person, which, for those at heightened risk of complications from COVID-19 infection, can be done curbside without entering the polling place. *See* N.C. State Bd. of Elections, Numbered Memo 2020-20 (Sept. 1, 2020), https://bit.ly/32Onr5M.

Massachusetts' highest court recently rejected a similar challenge to that State's ballot receipt deadline. In line with the requirement in most states, the Massachusetts deadline at issue required all absentee ballots to be received before the end of election day itself—without North Carolina's extra three-day grace period. *See Grossman v. Sec'y of the Commonwealth*, 151 N.E.3d 429, 2020 Mass. LEXIS 510, at *1–2 (Mass. 2020).[7] The Massachusetts Supreme Judicial Court held that this

[7] *Grossman* considered a challenge to the Massachusetts deadline for receipt of absentee votes in the September 1 primary election: "before 8 P.M. on September 1." *Grossman*, 2020 Mass. LEXIS 510, at *2. Massachusetts' receipt deadline for the general election is the same as North Carolina's—a ballot is timely if it "is received not later than 5 P.M. on November 6, 2020," *i.e.*, three days after the election, "and mailed on or before

deadline "does not significantly interfere with the constitutional right to vote," particularly given the obvious necessity of *some* "reasonable deadlines" and the fact that "voters, including those who have requested mail-in ballots, have multiple voting options, and thus are not limited to returning their ballots by mail." *Id.* at *3, *11. So too here. And notably, even when granting relief to plaintiffs challenging Pennsylvania's ballot receipt deadline, the Supreme Court of Pennsylvania extended that deadline from 8:00 p.m. on election day to 8:00 p.m. only three days after—essentially the same deadline that North Carolina currently has and a much shorter extension than the nine-day extension Plaintiffs request. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *89 (Pa. Sept. 17, 2020). And as indicated above, the Seventh Circuit (twice) and the Eleventh Circuit have recently stayed injunctions extending election day ballot receipt deadlines.

Deposition testimony confirms the lack of merit in Plaintiffs' claim. The one Plaintiff deposed thus far who had experience in the past with her absentee ballot being delayed in the mail and who is advocating for extending the ballot receipt deadline admitted the problem was not with her prior ballot not getting back to her county board of election on time, but with her receiving her ballot in the first instance. *See* Fowler Tr. at 19:3–22. She admitted that none of the relief Plaintiffs are seeking would have addressed the problem she experienced in the past, and that she does not intend to wait until the last minute to mail her absentee ballot in this election, but

November 3, 2020," as evidenced by a November 3 postmark. 2020 MASS. ACTS ch. 115, sec. 6(h)(3).

instead to vote and return her ballot the day she gets it. *See id.* at 15:18–20. And she has now in fact already voted.

c. Witness Requirement.

North Carolina's absentee voting witness requirement—reduced, for the November 2020 election, to a single witness—likewise does not severely burden the right to vote. Even for those voters who live alone, asking a family member, friend, neighbor, or coworker to take a few minutes to observe that voter cast her vote and then write their name, address, and signature is hardly the type of "severe burden," *Libertarian Party of N.C.*, 365 N.C. at 50, that "totally denie[s]" the right to vote, *Mays*, 951 F.3d at 787.

That is so notwithstanding Plaintiffs' contentions that "interacting with individuals outside of one's household can pose the risk of contracting a highly contagious and dangerous virus." Pls.' Mem. at 33. Even voters who live alone and are social distancing from all other adults can satisfy the witness requirement while abiding by all relevant social-distancing and sanitization guidelines. For example, any family member, friend, neighbor, mail-delivery person, food-delivery person, or multipartisan assistance team ("MAT") member can watch the voter mark their ballot through a window, glass door, or other barrier. At that point, the voter can pass the ballot under a closed door or through an open window to be marked, signed, and returned (after handwashing or sanitizing) without direct interaction between the two persons. These options are available to practically all voters living alone and would not require the voter or the witness to come within six feet of each other or

break other social-distancing guidelines. By engaging in these sorts of protective activities, voters can vote without exposing themselves to any appreciable risk of contracting the virus. Indeed, the NCSBE has expressly advised voters on complying with the witness requirement in a safe manner.[8]

As the federal court for the Middle District of North Carolina recently found in rejecting a similar challenge to the State's witness requirement, "even high-risk voters can comply with the One-Witness Requirement in a relatively low-risk way, as long as they plan ahead and abide by all relevant precautionary measures, like social distancing, using hand sanitizer, and wearing a mask; in other words, the burden on voters is modest at most." *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *102; *see also DCCC*, 2020 U.S. Dist. LEXIS 170427, at *51–57. Once again, there is simply no realistic risk associated with having another adult witness the execution of an absentee ballot through a closed window, so long as the two parties use separate pens and the ballot itself is disinfected before it is passed between them. *See* Expert Affidavit of Philip S. Barie, M.D., M.B.A. ("Barie Aff.") ¶ 35 (attached as Doc. Ex. 670).

Moreover, the witness requirement serves the important State interests of protecting the integrity of its elections, preventing fraud, and fostering confidence in the election process. The requirement is "especially important" during the pandemic because it helps "identify potential irregularities with absentee voting," which "takes place entirely out of the sight of election officials and is more susceptive to irregularity

[8] *FAQs: Voting by Mail in North Carolina in 2020*, N.C. STATE BD. OF ELECTIONS (Sept. 1, 2020), https://bit.ly/30vgciI.

and fraud than other methods of voting." Affidavit of Kimberly Westbrook Strach ¶¶ 54–55 (attached as Doc. Ex. 696). Accordingly, the witness requirement was pivotal in allowing the NCSBE to ferret out the patterns of fraudulent absentee ballots submitted as part of the Dowless scandal. *Id.* ¶ 59. Eliminating the requirement would divest the NCSBE and local county boards of elections of a "valuable tool[] [for] detecting and investigating irregularities and fraud." *Id.* ¶ 64.

Plaintiffs' deposition testimony does not help their claim. Each of the individual voters deposed who allege they live alone and are concerned about complying with the witness requirement admitted to one or more of the following: (1) having regular contact with other individuals outside their home since March 2020, *see* Johnson Tr. at 17:14–25; 19:4–15; 21:8–18; 22:10–20; 25:16–18; 26:13–19; 27:5–10 (spent weekend at cousin's lake house, gotten take-out numerous times, gotten haircuts and pedicures, sees her yard man weekly, has visited with a friend outdoors for over an hour, and drove a friend to have lunch at her club); Rabinowitz Tr. at 23:15; 26:7–18 (been to drug store, gotten haircut, been to doctors and took a ride share service to get there and back three times); (2) having someone they could ask to witness their ballot, *see* Johnson Tr. at 28:23–29:8; 36:3–9; Rabinowitz Tr. at 15:6–16; 19:5–15; 35:21–36:21; or (3) even having already made arrangements for a witness, *see* Johnson Tr. at 36:3–9 (stating that "a friend offered to come over – wanted hers witnessed, and we do each other's"). For those witnesses who do not live alone, they readily admitted they could have someone witness their ballots. *See* Fowler Tr. at 12:22–13:2; Jade Jurek Deposition Transcript ("Jurek Tr.") at 12:12–25

(attached as Doc. Ex. 735); William Dworkin Deposition Transcript ("Dworkin Tr.") at 19:23–20:5 (attached as Doc. Ex. 764). Indeed, Johnson has now successfully voted so she apparently was able to secure a witness.

d. Early Voting.

Plaintiffs contend that "limitations on the number of days and hours of early voting that counties may offer burdens in-person voting." Pls.' Mem. at 36. They assert that the "pandemic will force counties to offer fewer total early voting locations than they would under normal circumstances, and the resulting fewer cumulative early voting hours will lead to larger crowds and long lines for those who attempt to vote in person." *Id.* These "crowded polling places" will force Plaintiffs to "risk[] their health in order to cast their votes." *Id.*

First, the data does not bear out Plaintiffs' dire predictions about polling place crowds. "[T]he number of early voting sites per count remains stable in 2020" as compared to 2016, and the "number of early voting hours and days offered in the 2020 general election represents a large increase over the prior two presidential election years." Expert Affidavit of Keegan Callanan, Ph.D. ("Callanan Aff.") ¶¶ 8, 10 (attached as Doc. Ex. 807). Consequently, instead of leading to crowded polling places and long lines, this "significant increase in voting hours and days may logically be expected to reduce average waiting times at North Carolina's early voting sites." *Id.* ¶ 12. Moreover, "voter preference for in-person voting is expected to fall substantially in 2020 as compared to 2012 and 2016," *id.*—nearly 1.4 million absentee ballots have been requested as of October 21, 2020, compared with merely 210,493 requests 14

days before the 2016 election—logically entailing *less crowded* in-person polling places. *See also* Devore Aff. ¶¶ 4–10 (explaining efforts made to enlarge early voting sites and provide more opportunities to vote).

Second, neither does the data support Plaintiffs' claims about risks to health at in-person voting places. Plaintiffs cannot establish that polling places will not abide by necessary and appropriate social distancing and sanitizing protocols specifically designed to mitigate those risks. *See* N.C. State Bd. of Elections, Numbered Memo 2020-18 at 2–3 (Aug. 14, 2020), https://bit.ly/3jp2kO9 (requiring election officials to implement such measures, including mandated social distancing, masks for all election workers, and frequent sanitizing of high-touch areas). Recent peer-reviewed research found that the April election in Wisconsin highlighted by Plaintiffs produced "no detectable spike" in COVID-19 infections and thus appears to have been "a low-risk activity."[9] Dr. Fauci, the nation's leading expert on infectious diseases, recently suggested that voting in person, in compliance with recognized social distancing and other protective measures, poses no greater risk of infection than going to the grocery store.[10] And again, any voter who suffers from an elevated risk of COVID-19-related complications is **entitled to vote curbside**, without ever leaving his or her car. *See* N.C. GEN. STAT. § 163-166.9; Numbered Memo 2020-20.

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[9] Kathy Leung et al., *No Detectable Surge in SARS-CoV-2 Transmission Attributable to the April 7, 2020 Wisconsin Election*, 110 AM. J. PUB. HEALTH 1169 (2020), https://bit.ly/3gKKWKr.

[10] Nsikan Akpan, *What Fauci Says the U.S. Really Needs To Reopen Safely*, NAT'L GEOGRAPHIC (Aug. 13, 2020), https:/on.natgeo.com/2EQZxhM.

Counties also are authorized to set up walk-up curbside voting areas for voters who do not arrive at the polling place in a vehicle. *See* Numbered Memo 2020-20 at 2.

That leaves Plaintiffs with nothing more than the allegation that there will be "inevitable crowds and long lines" at some polling places in November. Pls.' Mem. at 36. But while "having to wait in line may cause people to be inconvenienced," that minor inconvenience—experienced in *every* election by at least some voters who reside in populous areas—does not alone constitute a severe burden on the right to vote. *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004); *see also Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration and Elections*, 446 F. Supp. 3d 1111, 1124 (2020) ("[W]hile the Court understands that a long commute or wait in line can be an inconvenience, courts have routinely rejected these factors as a significant harm to a constitutional right—particularly when there is no evidence of improper intent.").

The one Plaintiff deposed thus far who intends to vote in person and alleged concerns about inadequate opportunities to vote leading to long lines and crowds that would necessitate extending the early-voting period admitted that her regular polling place will be open, that in the past she has found times to vote that were not crowded, that she has no idea how the number of days or hours of early voting compare to prior elections, and that she can vote at times that will be less crowded such as during the day in the middle of the week. *See* Jurek Tr. at 23:8–22; 24:3–8; 25:13–23; 27:1–8; 28:1–7. Further undermining her claims, this Plaintiff admitted she could use curbside voting but that she did not want to. *Id.* at 20:22–21:16.

e. Ballot Harvesting Ban.

Plaintiffs claim that they are injured by North Carolina's restrictions on third-party assistance with requesting absentee ballots and delivering completed ballots. Pls.' Mem. at 35–36. But, first, none of the Plaintiffs assert that they have been injured by the restrictions on assistance with requesting absentee ballots. Indeed, each of the Plaintiffs deposed thus far who intend to vote absentee admitted to having already requested their absentee ballots, *see* Johnson Tr. at 29:9–20; Rabinowitz Tr. at 16:13–21; Fowler Tr. at 13:3–10; Dworkin Tr. at 9:25–20:5. Thus, there is no evidence of a single Plaintiff who requires assistance from other individuals or organizations in completing and submitting their absentee ballot applications.

Second, although Ms. Johnson, Ms. Rabinowitz, and Rosalyn and Tom Kociemba assert that they are injured by the restrictions on who can deliver completed ballots, Pls.' Mem. at 35–36, they are unlikely to succeed on their challenge to the ballot harvesting ban. Rosalyn and Tom Kociemba and Ms. Johnson, of course, have already voted, so this Court can provide them with no relief. With respect to the others, North Carolina law criminally prohibits anyone 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). But given that no criminal prosecutors are defendants in this case, the Court cannot provide relief from this criminal statute as regardless of what this Court does prosecutors will remain free to prosecute violations. In other words, Plaintiffs'

claims challenging this criminal ballot harvesting restriction, as pleaded, are not redressable, and thus the Court lacks jurisdiction to rule in Plaintiffs' favor.

Plaintiffs' claims fail apart from these fatal defects. Plaintiffs insist that this ballot harvesting ban "erects another barrier to absentee voting" for voters without access to postage, voters who are concerned about their ballot being delivered by the USPS on time, voters who are concerned about the risks of in-person voting, voters without immediate family members available to assist them in submitting their ballots, and voters whose ballots arrive too late to return by mail. Pls.' Mem. at 35–36. But because the ballot harvesting ban is a "reasonable and nondiscriminatory" rule, this Court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va.*, 826 F.3d at 719 (internal quotation marks and brackets omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate empirical verification." *Id.* (internal quotation marks omitted).

The State has met its burden. The Dowless scandal exposed that absentee ballots are particularly susceptible to fraud. *See* Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, Ctr. for Democracy & Election Mgmt., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. Indeed, Legislative Defendants' expert found evidence of at least 1,265 voters who voted in both North Carolina and another state in the 2016 general election—64% of whom cast an absentee ballot in North Carolina. Expert Report of Ken Block ¶ 38 (attached as Doc. Ex. 817). In the aftermath of the Dowless scandal, the State reasonably and credibly determined that

preventing abuse of the ballot collection process required targeted restrictions on handling completed absentee ballots by individuals outside of the voter's family and legal guardians. The State plainly has a legitimate and important interest in preventing such election fraud from occurring again.

Moreover, with respect to restrictions on who can return an absentee ballot if the voter did not want to use the postal service, each of the individual voters deposed admitted to one or more of the following: (1) regularly leaving their home and being in situations that put them in contact with others for at least the length of time it would take to return their ballots to their county boards of election, *see* Johnson Tr. at 17:14–25; 19:4–15; 21:8–18; 22:10–20; 25:16–18; 26:13–19; 27:5–10 (spent weekend at cousin's lake house, gotten take-out numerous times, gotten haircuts and pedicures, sees her yard man weekly, has visited with a friend outdoors for over an hour, and drove a friend to have lunch at her club); Rabinowitz Tr. at 23:23–24:11 (spent half an hour getting a haircut); (2) having the ability to get to their respective county board by car, walking, or a ride-service, *see* Rabinowitz Tr. at 26:13–18 (has taken a Lyft several times since March 2020); or (3) having a near-relative who could return their ballot for them, *see* Fowler Tr. at 15:1–13, 18–24. William Dworkin, the President of the one organizational Plaintiff in the case, the North Carolina Alliance for Retired Americans, admitted under oath that his organization does not plan to offer assistance to voters in returning their ballots even if the relief Plaintiffs are seeking is granted. *See* Dworkin Tr. at 56:13–18.

vii. Plaintiffs' Free Elections Clause Claim Was Unlikely To Succeed.

Plaintiffs' claim invoking North Carolina's Free Elections Clause fails as a matter of law because that clause simply has no application here, where all Plaintiffs have alleged are purportedly unconstitutional costs and burdens of participating in the political process.

The North Carolina Constitution's Free Elections Clause simply states that "[a]ll elections shall be free," N.C. CONST. art. I, § 10, a statement that clearly means that voters are free to choose how they cast their ballot without coercion, intimidation, or undue influence. The history of the provision confirms this reading. The modern version of this provision has its roots in the 1868 North Carolina Constitution. *See* N.C. CONST. art. I, § 10 (1868) ("All elections ought to be free."). Its origin, however, runs far deeper—through the 1776 North Carolina and Virginia declarations of rights and to the Eighth Clause of the English Declaration of Rights in 1689, which declared that the "election of members of parliament ought to be free." *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1797 (1972). In crafting provisions requiring elections to be "free," the drafters of both the English and Colonial declarations were responding to royal interference in the electoral process. Given this background—and the reality that there were substantial limitations on the right to vote at the time that such provisions were adopted—it comes as no surprise that the meaning of "free" in the Clause "is plain: free from interference or intimidation." JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 56 (2d ed., 2013).

This Court has confirmed that the Free Elections Clause requires only that voters be left free to choose how they will cast their ballot. In *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170–71 (1964), the Court invalidated a state-law requirement that those voters who wished to change their party affiliation must first take an oath to support their new party's nominees both in the next election and in any and all subsequent elections in which the voters maintained their new party affiliation. What implicated the Free Elections Clause was not the burden of having to appear and take an oath, or even the fact that the oath was one of loyalty to a particular party, but rather the reality that the promise to vote only for candidates of one party imposed a "shackle" on the free choice of the voter:

> The oath to support future candidates violates the principle of freedom of conscience. It denies a free ballot—one that is cast according to the dictates of the voter's judgment. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

Id. It was the fact that the oath required the voter to vote for particular candidates that "violate[d] the constitutional provision that elections shall be free." *Id.*

Courts have identified several forms of state action that may compromise a free election, including (1) serious threats of physical violence, *see Hatfield v. Scaggs*, 133 S.E. 109, 113 (W. Va. 1926); (2) requiring a voter to disclose a secret ballot, *see Whitley v. Cranford*, 119 S.W.3d 28, 40–41 (Ark. 2003) (Imber, J., dissenting) (discussing cases); and (3) funding campaigns or initiatives with state funds, *see Stanson v. Mott*, 551 P.2d 1, 9–10 (Cal. 1976). But we are aware of no court that has

ever found a free-election provision violated when a voter incurs incidental costs or inconveniences to exercise the right to vote.

Plaintiffs' claim under the Free Elections Clause thus fails because they have not alleged that any of the challenged measures coerces, intimidates, or influences the free choice of North Carolina's voters in any of the ways that the courts have found would compromise a free election. Instead, they merely complain of concerns about the "risks" posed by the challenged measures, or the "increased costs and burdens" voters must undergo because of the pandemic. Am. Compl. ¶¶ 6, 141. None of these allegations suggest that any of the challenged measures somehow render voters powerless to follow the dictates of their own free will—which means that Plaintiffs have failed to allege a violation of the Free Elections Clause, and their claim fails as a matter of law.

* * *

Despite these decided weaknesses in Plaintiffs' claims that render them unlikely to succeed on the merits, there is no evidence that the weaknesses were ever explored by the NCSBE or that they informed the ultimate settlement analysis of either party. Moreover, the State has a compelling interest in deterring voter fraud and protecting election integrity, a theme that underlies the challenged election law provisions. The consent judgment does not meaningfully analyze these state interests either. The consent judgment fails on the "most important factor"—likelihood of success on the merits—so this Court must vacate it. *Flinn*, 528 F.2d at 1172.

2. The Relief Afforded By The Consent Judgment Is Vastly Disproportionate To The Purported Harm.

The consent judgment is not fair, adequate, and reasonable for the second, independent basis that the relief it affords is vastly disproportionate to the purported harm. Indeed, in several respects the consent judgment goes *beyond* the relief Plaintiffs are seeking. For example, the consent judgment purported to vitiate the witness requirement for *all* voters, not just those who reside without another adult. *See* Am. Compl. at 39. The consent judgment extends the ballot receipt deadline for ballots sent by commercial carrier despite Plaintiffs limiting their claims to ballots sent through the USPS. *Id.* at 40. And despite Plaintiffs not even seeking to have contactless drop boxes implemented as relief in this case, *see* Am. Compl. at 38–41, and despite that request being denied by the *Democracy N.C.* court, *see* 2020 U.S. Dist. LEXIS 138492, at *128–29, the consent judgment allows ballots submitted in drop boxes to be counted statewide.

The District of Minnesota recently rejected a consent judgment because of overbreadth problems similar to those plaguing this one. There, the court found that the burdens on particular voters could not possibly support the State's "blanket refusal to enforce [Minnesota's] witness requirement." Fairness Hearing Tr. at 11–12, *League of Women Voters of Minn. Educ. Fund v. Simon*, No. 20-cv-1205 (D. Minn. June 23, 2020) (attached as Doc. Ex. 846). As the court put it, "the consent decree is not substantively fair or reasonable because it would, if approved, impose relief that goes well beyond remedying the harm Plaintiffs allege to suffer in support of their as-applied challenge to Minnesota's witness requirement." *Id.* at 10. It is a well-settled

principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Appeal of Barbour*, 112 N.C. App. 368, 373–74, 436 S.E.2d 169, 173–74 (1993). Because the consent judgment violates this principle, granting Plaintiffs relief that is vastly disproportionate to the purported harm they allege, the consent judgment is not fair, adequate, and reasonable, and this Court must vacate it.

E. The Consent Judgment Must Be Vacated Because It Is Against The Public Interest.

The consent judgment disserves the public interest in at least three ways. First, the public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members and civil litigants. Second, because the challenged election laws are constitutional, vacating the consent judgment "is where the public interest lies." *Tex. Democratic Party*, 961 F.3d at 412 (internal quotation marks omitted). Courts should not "lightly tamper with election regulations," *Thompson*, 959 F.3d at 813, so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact," *id.* at 812. This is especially true in the context of an ongoing election. *Thompson*, 959 F.3d at 813; *Respect Me. PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). And it remains true even though the NCSBE has chosen to capitulate to Plaintiffs' demands instead of defending its duly enacted election laws. Allowing the consent judgment to be enforced, therefore, would undermine the constitutional election laws.

Third, the consent judgment will engender substantial confusion, among both voters and election officials, by changing the election rules after the election has already started. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207 (explaining that the Supreme Court "has repeatedly emphasized that lower . . . courts should ordinarily not alter the election rules on the eve of an election"); *Purcell*, 549 U.S at 4–5. To date, voters have requested nearly 1.4 million absentee ballots and cast over 2.1 million absentee ballots.[11] The NCSBE itself admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and engender disparate treatment of voters in the ongoing election. *See* Reply Brief of the State Board Defendants-Appellants at 8, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9 ("The proximity to the election . . . make[s] it practically impossible for the State Board to fairly and effectively administer the November 2020 elections under the [challenged election law], particularly in light of the significant administrative and voter-outreach efforts that would be required to do so."); *id.* at 27–35 (discussing the difficulty of changing election procedures in close proximity to the election and

[11] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 21, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 20, 2020).

acknowledging that late-stage changes "may engender increased confusion among voters and poll workers," *id.* at 34).

The consent judgment is thus against the public interest and must be vacated.

F. The Consent Judgment Must Be Vacated Because There Is A Substantial Risk It Is The Product Of Collusion.

The substantial risk of collusion at play in this litigation is another reason for the Court to vacate the consent judgment. The consent judgment likely does not reflect arm's-length negotiations and gives a windfall to Plaintiffs. Consent judgments must be not only substantively sound but also procedurally fair. Consent judgments are procedurally fair when they flow from negotiations "filled with 'adversarial vigor.'" *United States v. City of Waterloo*, No. 15-cv-2087, 2016 U.S. Dist. LEXIS 7224, at *12 (N.D. Iowa Jan. 20, 2016). Agreements that lack adversarial vigor become "collusi[ve]," and are, by definition, not fair. *Colorado*, 937 F.2d at 509. In fact, a consent judgment between non-adverse parties "is no judgment of the court[;] [i]t is a nullity." *Lord v. Veazie*, 49 U.S. 251, 256 (1850). This rule stems from the fundamental requirement that parties be concretely adversarial before a court can act on their claims. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). The requisite adversity plainly is lacking when "both litigants desire precisely the same result." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 47–48 (1971).

Regrettably, "it is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental actions because of rifts within the bureaucracy or between the executive and legislative branches." *Ragsdale v. Turnock*,

941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part). That is why courts must and do look skeptically at consent judgments used to enact or modify governmental policy. Otherwise, non-adverse parties could employ consent judgments to "sidestep political constraints" and obtain relief otherwise unavailable through the political process. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 317. In particular, "judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper v. Bd. of Election Comm'rs of Chi.*, 814 F.2d 332, 340 (7th Cir. 1987); *see Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that a consent decree is a ploy in some other struggle.").

Employing a consent judgment to sidestep political constraints and obtain relief otherwise unavailable through the political process is exactly what is occurring here. The NCSBE, despite Executive Director Bell's March 26, 2020 letter to the General Assembly, failed to convince the General Assembly to adopt all of its recommendations. For example, the General Assembly considered Executive Director Bell's recommendation that it eliminate the witness requirement but rejected it, deciding to accept her alternative recommendation to reduce to one the witness requirement instead. *See* HB1169 § 1.(a). Moreover, both a state court and a federal court have rejected motions to preliminarily enjoin the witness requirement, finding that plaintiffs in those cases had not shown a likelihood of success on the merits. *See* Order on Inj. Relief at 6–7, *Chambers*; *Democracy N.C.*, 2020 U.S. Dist. LEXIS

138492, at *103. And according to two NCSBE members who recently resigned, the NCSBE entered into the consent judgment without apprising NCSBE members of the fact that "a lot of the concessions" in the consent judgment had been previously rejected by these courts. *See* Ken Raymond Resignation Letter (Sept. 23, 2020) (attached as Doc. Ex. 861); David Black Resignation Letter (Sept. 23, 2020) (attached as Doc. Ex. 863). Those same board members were also not apprised of the Legislative Defendants' significant involvement in those cases or that the legislature was not being informed of or consulted with about the proposed settlement. *See* Affidavit of Ken Raymond (attached as Doc. Ex. 866); Affidavit of David Black (attached as Doc. Ex. 892). The NCSBE provides no justification for its sudden course reversal in the face of its demonstrated successes in court.

Also concerning is the fact that Legislative Defendants were shut out of settlement negotiations. If Plaintiffs and the NCSBE truly wanted to maximize the likelihood of certainty, they likely would not have conducted their negotiations in secret and shut out representatives of the body constitutionally charged with prescribing regulations for the conduct of elections.

There are other circumstances that raise concerns about potential collusion in this case. The claims here are essentially a subset of the claims asserted in *Stringer*, a case filed by Plaintiffs' counsel several months before this one. The principal difference is that Plaintiffs in this case have attempted (unsuccessfully, in Legislative Defendants' view) to plead their claims as as applied challenges—a characterization the NCSBE has endorsed. The chronology and the NCSBE's ready agreement with

Plaintiffs that the claims here are as applied are consistent with collusion between the parties. The August 18, 2020 notice of voluntary dismissal of claims against the State of North Carolina, originally a defendant here, also is consistent with collusion, as it appears to have been done to provide an argument (again, unsuccessfully in Legislative Defendants' view) for why Legislative Defendants' agreement was not necessary for the entry of a consent judgment. *See* N.C. GEN. STAT. § 1-72.2(a) ("[W]hen the State of North Carolina is named as a defendant in [cases in state court challenging the validity of an act of the General Assembly] both the General Assembly and the Governor constitute the State of North Carolina."). And the shifting rationales for the amendment to Numbered Memo 2020-19—first, that it was done to comply with the *Democracy N.C.* injunction, but then only that it was consistent with the injunction—provide additional reasons for concern.

At bottom, the NCSBE is in effect aligned with Plaintiffs, and this Court should find that the consent judgment bears too many hallmarks of collusion to be appropriately entered by the Court. Accordingly, the consent judgment must be vacated.

II. THE SUPERIOR COURT'S CONSENT JUDGMENT WILL CAUSE IRREPARABLE INJURY AND IS CONTRARY TO THE BALANCE OF THE EQUITIES.

The remaining equitable factors governing the availability of the writ of supersedeas likewise favor preserving the status quo and staying the consent judgment pending appeal. The consent judgment will irreparably injure Legislative Defendants if this Court does not stay it pending appeal. A stay is necessary to protect Legislative Defendants' interests in defending duly enacted state election laws, the

integrity of the ongoing election, and North Carolinians voting rights. Furthermore, the consent decree substantially alters the current election law framework that governs the ongoing election. As explained above, the NCSBE itself has admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and engender disparate treatment of voters in the ongoing election.

Consequently, a stay of the enforcement of the consent judgment is necessary to preserve the status quo, prevent confusion, and preserve the appellate court's ability to afford Legislative Defendants relief. Absent a stay, the NCSBE and the county boards of elections will move toward implementing procedures and conducting voter education efforts for extending the absentee ballot receipt deadline to nine days after election day and allowing unmanned drop boxes for voters to deliver completed ballots, efforts that may confuse voters and election officials should Legislative Defendants prevail on appeal and restore the status quo.

MOTION TO STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, Legislative Defendants respectfully move this Court to issue a temporary stay of the trial court's 2 October 2020 Order. Legislative Defendants further incorporate and rely on the arguments presented in the foregoing petition for writ of supersedeas in support of this Motion for Temporary Stay.

CONCLUSION

Wherefore, the petitioners respectfully pray this Court to issue its writ of supersedeas to the Superior Court of Wake County of the consent judgment above specified, pending issuance of the mandate to the Court of Appeals following its review and determination of the appeal; and that the petitioners have such other relief as the Court may deem proper. Petitioners also request that this Court temporarily stay enforcement of the injunction until such time as this Court can rule on Petitioners' Petition for Writ of Supersedeas.

Respectfully submitted this the 21st day of October, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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VERIFICATION

The undersigned attorney for Legislative Defendants, after being duly sworn, says:

I have read the foregoing Petition for Writ of Supersedeas and Motion for Temporary Stay and pursuant to Appellate Rule 23, I hereby certify that the material allegations and contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

I also hereby certify that the documents attached to this Petition for Writ of Supersedeas and Motion for Temporary Stay are true and correct copies of the pleadings and other documents from the file in Wake County Superior Court and/or are documents of which this Court can take judicial notice.

Nicole Jo Moss

Wake County, North Carolina

Sworn to and subscribed before me this 21st day of October, 2020.

Cynthia Fabian Medina

Notary's Printed Name, Notary Public

My Commission Expires: 05/03/2022

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 21st day of October, 2020, served a copy of the foregoing Petition and Motion by electronic mail and by first class mail on the following business day, on the following parties at the following addresses:

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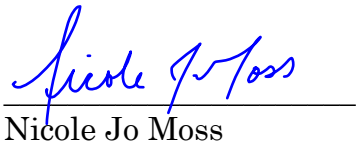

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No. _____ TENTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

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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, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants,

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, and,

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., and NORTH CAROLINA REPUBLICAN PARTY,

Republican Committee Intervenor-Defendants.

From Wake County

No. P20-513

****

REPUBLICAN COMMITTEES' PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc., and the North Carolina Republican Party (collectively, the "Republican Committees") respectfully (1) petition the Court to issue a writ of supersedeas suspending the Superior Court's October 2, 2020 Order, and move to (2) temporarily stay enforcement of the Superior Court's October 2, 2020 Order during review of the petition for writ of supersedeas.

INTRODUCTION

Three "Numbered Memoranda" directly conflict with the election code that the General Assembly revised in June 2020, on an overwhelmingly bipartisan basis, to address the COVID-19 pandemic. The BOE asserts authority to make these changes based on a Consent Judgment approved by the Superior Court on October 2, over the objections of the Republican Committees as well as the Speaker of the House and the President pro tempore of the Senate ("Legislative Defendants").

This secretly-negotiated deal suffers fundamental flaws. The BOE had no authority to enter the deal and the Superior Court had no authority to approve it. This Court's decisions in *James v. Bartlett*, 359 N.C. 260 (2005) and *Adams v. N.C. Dep't of Nat. & Economic Res.*, 295 N.C. 683 (1978), require that the BOE adhere to North Carolina's duly-enacted statutes and not supplant the lawmaking authority of the General Assembly. The Consent Judgment does so by overriding the statutory deadline for receiving absentee ballots, undermining the statutory postmark requirement, and neutering statutory prohibitions on ballot harvesting. Moreover, the order conflicts with the Elections Clause in Article I, § 4, the Electors Clause in Article II, § 1, and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. After expiration of a temporary

restraining order and a temporary stay, the BOE's changes became effective on October 19, just two weeks before the November 3 election, and are already causing widespread chaos for voters and election administrators.

The Republican Committees ask this Court to grant their petition for writ of supersedeas and motion to temporarily stay the Superior Court's order pending appeal. Only urgent action can prevent immediate and irreparable harm to the Republican Committees, North Carolina's general public, and to confidence in North Carolina's election process.[1]

BACKGROUND

A. North Carolina's Election Code and the BOE's Role in Administering Elections.

North Carolina offers its citizens three ways to vote: (1) absentee voting by mail-in ballot, (2) in-person early voting, and (3) in-person voting on Election Day. North Carolina's election code provides for "no excuse" absentee voting; any qualified voter may vote absentee by complying with the safeguards enacted by the General Assembly. These three options maximize election participation, but each is regulated to ensure fair, honest, and secure elections.

The first option is to vote by absentee ballot. *See generally* N.C.G.S. § 163 art. 20. Under the General Statues, North Carolina allows "[a]ny qualified voter of the State [to] vote by absentee ballot in a statewide . . . general . . . election." *Id.* § 163-226(a). To ensure election integrity, 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

[1] *See* Leland Decl., Ex. 1, Oct. 18.

than 5:00 p.m. on the day of the" general election. *Id.* § 163-231(b)(1). A ballot is timely if it is postmarked 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 to complete and submit 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. County boards can establish one or more early-voting locations, which the BOE must approve. *Id.* § 163-227.6(a). Those locations opened on October 15 and will remain available until the last Saturday before the election. *Id.* § 163-227.2(b).

The third option is in-person voting on election day, November 3. *See generally id.* § 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.*

B. The General Assembly Responds to the COVID-19 Pandemic.

The General Assembly acted decisively by responding to COVID-19 with HB 1169, passing it into law on June 12, 2020. In the six week lead up to enacting HB 1169,[2] the General Assembly considered many proposals on how to amend the election code in response to COVID. The BOE advanced several of those proposals, including one to eliminate the witness requirement for absentee ballots. Leland Decl., Ex. 3, State Bd. Mar. 26, 2020 Ltr., at 3. Moreover, the General Assembly had the benefit of information about other primary elections conducted during the

[2] Leland Decl., Ex. 2, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3.

pandemic, such as Wisconsin's, and reports of challenges faced by the United States Postal Service ("USPS"). And the General Assembly was familiar with the recent election in North Carolina's Ninth Congressional District, which was so tainted by "absentee ballot fraud" that it had to be held anew, and from that incident understood the importance of security in absentee voting. *See id.*, Ex. 4, *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,[3] and Governor Cooper signed it into law. For the November 2020 election, among other things, HB 1169:

- 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).

These changes balanced public health concerns against the legitimate need for election security. To strike this balance, the General Assembly retained several provisions, including: (1) the Postmark Requirement, (2) the three-day Receipt Deadline, (3) the Assistance Ban and Ballot

[3] *Id.*, Ex. 5, HB 1169, Voting Record.

Delivery Ban, and (4) the Witness Requirement, although for the 2020 election only one witness is required.

Until the Consent Judgment, the BOE faithfully followed the duly-enacted election code. The absentee ballot packages already sent to 4.7 million households instruct voters that they "must have one witness who is nearby when [they] mark [their] ballot" and that they must "have applied [their] postage stamp" by November 3 (if mailing the absentee ballot in). *See* Leland Decl, Ex. 6, Absentee Ballot Envelope. The BOE Website instructs voters that "[a]bsentee ballots received after 5 p.m. on Election Day will be counted only if they are postmarked on or before Election Day and received by mail no later than 5 p.m. November 6," *see id.*, Ex. 7, BOE Website. And for three months BOE vigorously and successfully defended the election code as constitutional, fair, and necessary to the administration of an accessible, fair, and accurate election.

C. The Coordinated Litigation Effort To Subvert HB 1169 and Alter North Carolina's Election Procedures.

Certain groups have tried to use the COVID-19 pandemic as the vehicle to effectuate their long-desired election policies through the courts.[4] At least seven lawsuits attacking parts of HB 1169 have been filed in North Carolina.

The first court to consider these challenges was the U.S. District Court for the Middle District of North Carolina, which issued a comprehensive 188-page decision on August 4. *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) (Osteen, J.). In that case, Plaintiff claimed that numerous provisions of North Carolina's election code, including the Witness Requirement, Assistance Ban, and Ballot Delivery

[4] By one count, at least 404 lawsuits have been filed nationwide attacking state election statutes and procedures. *See* Stanford-MIT Healthy Elections Project, COVID-Related Election Litigation Tracker (last visited Oct. 21, 2020), *available at* https://healthyelections-case-tracker.stanford.edu/.

Ban, violated federal constitutional and statutory law. *Id.* at *5–10. Legislative Defendants intervened to defend the General Assembly's election code, and the Republican Committees appeared as amici. *Id.* at *3. After a three-day evidentiary hearing and extensive argument, the district court rejected nearly all of the claims, finding that plaintiffs could not show a likelihood of success on the merits. *Id.* at *1, 64. Moreover, it found that even if certain provisions could "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" so close to an election. *See id.* at *45 (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)).

Although the district court denied nearly all of the plaintiffs' claims, it held that North Carolina's lack of a notification and cure procedure for deficient absentee ballots likely violated procedural due process. *Id.* at *55. Accordingly, it entered a limited injunction prohibiting the BOE "from allowing county boards of elections to reject a delivered absentee ballot without notice and an opportunity to be heard until" it could implement a uniform cure procedure. *Id.* at *64.

The second decision to reject efforts to enjoin certain aspects of HB 1169 was *Chambers v. State of North Carolina*, No. 20-CVS-5001242 (Super. Ct. Wake Cnty.), issued on September 3, the day before the BOE began mailing absentee ballots. After referral to a three-judge panel, pursuant to N.C.G.S. §§ 1-267.1, 1A-1 and Rule 42(b)(4), the three-judge court (comprising Judges Hinton, Bell, and Lock) denied the plaintiffs' motion to preliminarily enjoin the Witness Requirement. *See* Leland Decl., Ex. 8. The court unanimously ruled that the plaintiffs were unlikely to prevail on the merits. *Id.* at 6. Just as important, and as an alternative holding, the court concluded "the equities do not weigh in [plaintiffs'] favor" because of the proximity of the election, the tremendous costs that their request would impose on the State, and the confusion it would cause voters. *Id.* at 7. Adopting the BOE's arguments, both the *Democracy N.C.* and

Chambers courts decided—on August 4 and September 3, respectively—that it was by then too late to make major revisions to the election code.

D. Plaintiffs' Lawsuit and the Superior Court's Approval of the Consent Judgment.

Plaintiffs in this case filed their complaint on August 10, 2020, and an amended complaint and motion for a preliminary injunction on August 18. Plaintiffs requested the court to "[s]uspend the Witness Requirement for single-person or single-adult householder" 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." Leland Decl., Ex. 9, Am. Compl. at 4. On August 24, the Republican Parties moved to intervene as defendants, and the court granted their motion on September 28.

Meanwhile, on September 22, Plaintiffs and the BOE announced a settlement by Consent Judgment, and moved for approval of that deal. The Legislative Defendants and the Republican Committees played no role in the negotiation of the Consent Judgment and opposed its entry. The Superior Court refused the Legislative Defendants' motion to refer the case to a three-judge court on October 2, even though it involved a law passed by that legislature with overwhelming majorities. The Court also held a hearing on the Motion for Entry of a Consent Judgment that day and approved the Consent Judgment at the end of the hearing. Among the Numbered Memos advanced as part of the Consent Judgment was a revised version of Memo 2020-19, which (through the guise of a "cure" process for deficient absentee ballots) undermined the statutory Witness Requirement.

Although the BOE represented to the Superior Court that the Consent Judgment was necessary to ensure the BOE's compliance with Judge Osteen's limited preliminary injunction order in *Democracy N.C.*, when informed of those representations Judge Osteen vehemently disagreed, stating he "d[id] not find [Revised Numbered Memo 2020-19] consistent with [his

August 4] order." Leland Decl., Ex. 10, *Democracy N.C.*, No. 20-cv-00457, Order at *12 (M.D.N.C. Sept. 30, 2020). He then ordered a status conference. *Id*. Upon further review, Judge Osteen wrote that he found it "unacceptable" that the BOE "[u]s[ed] the . . . Due Process language [from his August order] to effectively override the legislative witness requirement, after [Judge Osteen] upheld it." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-CV-457, 2020 WL 6058048, at *7 (M.D.N.C. Oct. 14, 2020). While BOE Executive Director Karen Brinson Bell submitted a declaration suggesting that the Revised Memo 2020-19 did not effectively eliminate the witness requirement, Judge Osteen was unconvinced, concluding the declaration "contradict[ed] her [previous] testimony . . . in which she stated unequivocally that a ballot with a missing witness signature could not be cured, but instead had to be spoiled." *Id*. at *9.

Judge Osteen's decision undercuts the Superior Court's basis for approving the Consent Judgment. As Judge Osteen determined, the BOE's "representations to the North Carolina Superior Court explaining the contents and effects of [his] August Order are at best inaccurate, and were used to support the [BOE's] argument to obtain approval of the Consent Judgment and modify the witness requirement." *Democracy N.C.*, 2020 WL 6058048, at *9. Nevertheless the BOE continued to misrepresent the legal theory upon which the Consent Judgment was predicated in front of the Court of Appeals, claiming Judge Collins "did not rely on the injunction entered in *Democracy North Carolina* as the basis for the [BOE's] authority to enter into the consent judgment," BOE Br. at 17, a contention Judge Osteen definitively debunked. He held that Revised Numbered Memo 2020-21 had the effect of eliminating the Witness requirement, in violation of the election code and in disregard of his August 4 ruling. *Democracy N.C.*, 2020 WL 6058048, at *9. Accordingly, Judge Osteen enjoined the BOE from implementing the Revised Numbered Memo in a way that undermined the Witness Requirement. *Id.* at *13.

E. The Consent Judgment's Purported Changes to North Carolina's Voting Law.

The Consent Judgment purports to resolve Plaintiffs' lawsuit by substantially altering North Carolina's election code through three "Numbered Memos." The Numbered Memos, which are attached to and a part of the Consent Judgment, override North Carolina's election code in the following ways:

Witness requirement: Revised Numbered Memo 2020-19 allowed an absentee voter to substitute his or her own "voter certification" in lieu of a witness to the ballot. The effect of this change was to override the statutory Witness Requirement. *See* N.C.G.S. § 163-231(a). The U.S. District Court enjoined the change on October 14.[5]

Receipt deadline. If absentee ballots are submitted by mail, the election code requires that they be postmarked by election day and received by 5:00 p.m. **no later *than three days after election day*** (by Nov. 6, 2020). N.C.G.S. § 163-231(b)(2). Numbered Memo 2020-22 purports to extend that deadline by six days: "An absentee ballot shall be counted as timely if it . . . 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. 11, Numbered Memo 2020-22 at 1 (emphasis added).

Postmark requirement. The election code requires that absentee ballots be "***postmarked***" on or before election day at 5:00 p.m. in order to be counted. N.C.G.S. § 163-231(b)(2). "Postmark" is a well-understood term—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."

[5] Judge Osteen concluded that elimination of the Witness Requirement violated his prior Order in the case. *Democracy N.C.*, 2020 WL 4484063, at *64. On October 18, the BOE acceded to Judge Osteen's October 14 injunction and issued another revision to Numbered Memo 2020-19, producing version 3.

Black's Law Dictionary (11th ed. 2019).[6] Numbered Memo 2020-22 provides, however, 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. 11, Numbered Memo 2020-22 at 2 (emphasis added). It therefore overrides the statute.

Ballot delivery and assistance bans. Pursuant to the laws enacted by the General Assembly, 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 another voter's absentee ballot for delivery 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 with the completion and submission of an absentee ballot. N.C.G.S. § 163-226.3. Numbered Memo 2020-23, however, 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. 12, Numbered Memo 2020-23 at 2-3.

F. The U.S. District Court's TRO Enjoining Enforcement of the Numbered Memos Attached to the Settlement Agreement.

On September 26, the Republican Committees and others filed suit in the U.S. District Court for the Eastern District of North Carolina and sought a temporary restraining order ("TRO").

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[6] *See* also USPS processing guidelines, https://about.usps.com/handbooks/po408/ch1_003.htm.

The lawsuit asserted four grounds for relief: (1) violation of the Elections Clause in the U.S. Constitution, Art. II, § 4; (2) violation of the Electors Clause of the U.S. Constitution, Art. II, § 1; (3) dilution of the right to vote under the Fourteenth Amendment of the U.S. Constitution; and (4) denial of equal protection under the Fourteenth Amendment of the U.S. Constitution. *Id.*, Ex. 13, *Wise v. N.C. State Bd. of Elections*, No. 5:20-cv-505-D, Dkt. 1 (E.D.N.C. Sept. 26, 2020). The Legislative Defendants filed a complaint in the same court raising similar challenges and also requesting a TRO. *Id.*, Ex. 14, *Moore v. Circosta*, No. 20-cv-507-D, Dkt. 1 (E.D.N.C. Sept. 26, 2020).

The District Court heard the TRO motions on October 2 and granted the motions on October 3, temporarily enjoining the defendants in *Wise* and *Moore* from enforcing the challenged Numbered Memos "or any similar memoranda or policy statement that does not comply with the requirement of the Equal Protection Clause." *Id.*, Ex. 15, *Moore*, No. 20-CV-507, Order at *19 (E.D.N.C. Oct. 3, 2020). This order was "intended to maintain the status quo" until no later than October 16, 2020. *Id*. The court found the "plaintiffs' argument concerning the Equal Protection Clause persuasive," concluding that the plaintiffs were likely to succeed on the merits of their claims and would suffer irreparable harm without a TRO. *Id.* at 12. It also found that the balance of equities tipped in their favor and the TRO was in the public interest. *Id.*

In evaluating the factors for a TRO, the court expressed concern that the Numbered Memos would "*materially chang[e]* the electoral process in the middle of an election after over 300,000 people have voted," and observed that the TRO would "restor[e] the status quo for absentee voting in North Carolina," while the court assesses the case. *Id*. at 15 (emphasis added). By the same order, the Court transferred both complaints (*Wise* and *Moore*) to Judge Osteen in the Middle District of North Carolina. *Id*. at 19.

G. Proceedings before Judge Osteen.

An order entered by Judge Osteen last Wednesday underscores why a stay must issue. In *Moore v. Circosta*, Judge Osteen concluded that the Memos likely violate the Equal Protection Clause of the United States Constitution by subjecting North Carolina voters to two separate absentee voting regimes based on the arbitrary factor of when they voted. 2020 WL 6063332, at *30. For example, the extension of the Receipt Deadline "results in disparate treatment," as previous absentee voters complied with the statutory deadline while future absentee voters will be under no such obligation. *Id.* at *19. Given the further likelihood of irreparable injury if the Receipt Deadline were to go into effect, Judge Osteen determined "the unequal treatment of voters . . . should be enjoined." *Id.* at *22, 30.[7]

Furthermore, while he ultimately concluded that the plaintiffs lacked standing, he noted the BOE likely violated its statutory obligation to adhere to North Carolina's voting laws by agreeing to implement the Memos, concluding that "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." *Id.* at *30. Despite the Memos' constitutional and statutory deficiencies, Judge Osteen decided that as a Federal Judge he lacked authority to enjoin the BOE's implementation of the Numbered Memos. *Id.*

On October 16, Judge Collins held a hearing on, and denied, motions to stay the Consent Judgment filed by the Republican Committees and the Legislative Defendants. Leland Decl., Ex. 17. Nevertheless, the TRO issued by Judge Dever preserved the status quo from October 3-16. *See*

[7] The evening of October 20, 2020, the U.S. Court of Appeals for the Fourth Circuit, in a divided ruling issued by the *en banc* court, denied a motion for injunction pending appeal from Judge Osteen's denial of the injunction. *See* Leland Decl., Ex. 16, *Wise v. Circosta*, No. 20-2104, Dkt. 20 at *2 (4th Cir. Oct. 20, 2020).

id., Ex. 15, *Moore v. Circosta,* No. 20-cv-507, 2020 WL 5880129 (E.D.N.C. Oct. 3, 2020). That TRO expired at 11:59 p.m. on October 16. *See id.*, Ex. 18, *Wise*, No. 20-cv-912, Order, Dkt. 63. On October 15, the Court of Appeals preserved the status quo by staying Judge Collins' order before the TRO expired. *See id.*, Ex. 19, *N.C. Alliance for Retired Americans v. N.C. State Bd. of Elections*, No. P20-513, Order, at *1 (N.C. Ct. App. Oct. 15, 2020).

On October 19, however, the Court of Appeals withdrew its temporary stay and denied the Petitions for Writs of Supersedeas filed by the Republican Committees and Legislative Defendants. *See N.C. Alliance for Retired Americans v. N.C. State Bd. of Elections*, No. P20-513, Order, at *1 (N.C. Ct. App. Oct. 19, 2020). The BOE immediately implemented the challenged Numbered Memos, which are now publicly available on the BOE's website.[8] As shown (pp. x above), the challenged Memos extensively changed the election code. As predicted by the three-judge court in *Chambers* and the U.S. District Courts in *Democracy N.C.* (Osteen, J.) and *Moore* (Dever, J.), these mid-election changes are already causing chaos among voters and election officials. A long-time county election official points out that just the extension of the receipt deadline for absentee ballots would "substantially increase the administrative burden on county election Boards, the risk of error, and the potential for significant delays." Leland Decl., Ex. 20, Summa Aff. ¶ 11. This secret deal requires even more substantial changes than addressed in those affidavits, with far less time to implement them.

A writ of supersedeas is needed to halt the implementation of the Consent Judgment. The challenged Memos set forth rules that are inconsistent with the instructions in the absentee ballot packages already sent to approximately 4.7 million households. Over 600,000 absentee ballots

[8] *See* https://www.ncsbe.gov/about-elections/legal-resources/numbered-memos (last accessed October 20, 2020).

have already been cast, in accordance with the instructions in those packages.[9] And the BOE's website continues to tell voters that "[a]bsentee ballots received after 5 p.m. on Election Day will be counted only if they are postmarked on or before Election Day *and received by mail no later than 5 p.m. November 6*" in contrast to the challenged Memos which allow receipt of ballots until November 12. *Id.*, Ex. 7, BOE Website (emphasis added). Voters and county election administrators are, in fact, confused. *See id.*, Ex. 21, Supp'l Summa Aff. ¶ 4. A writ of supersedeas pending resolution of this appeal is essential to preserve an orderly, fair, and accurate election and to prevent the BOE from implementing procedures that would violate the Elections, Electors, and Equal Protection Clauses of the U.S. Constitution.

REASONS FOR CONSIDERING THIS PETITION

The Republican Committees satisfied their obligations under N.C. R. App. P. 23, which permits "[a]pplication to be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal is taken." *See* N.C. R. App. P. 23(a)(1). Applicants must seek a stay from the trial court and Court of Appeals before petitioning for a writ of supersedeas in the Supreme Court. N.C. R. App. P. 23(a)–(b). The Republican Committees adhered to this rule by petitioning the Superior Court and Court of Appeals for a stay of the Consent Judgment, and both petitions were denied.

Grant of the Republican Committees' petition for supersedes is urgently needed to prevent the BOE from implementing the Numbered Memos at issue. Without this Court's intervention, the BOE will override multiple absentee voting requirements enacted by the General Assembly,

[9] *See* https://www.ncsbe.gov/voting/vote-mail/detailed-instructions-voting-mail#returning-a-ballot (last accessed Oct. 21, 2020).

an outcome that conflicts with this Court's decisions holding that the BOE has no such authority. *See James*, 359 N.C. at 270 (determining that the BOE is required to adhere to North Carolina' statutory voting requirements); *Adams*, 295 N.C. at 696 (providing that the legislature lacks the authority to delegate its lawmaking power to "any agency which it may create"). The BOE will further continue to supplant the General Assembly's constitutional authority to set the time, manner, and place for federal elections, and to determine the process for choosing Presidential Electors, while depriving North Carolina's citizens of their right to vote on equal terms under the Equal Protection Clause of the U.S. Constitution. The election is imminent. The Court's grant of a writ of supersedeas and temporary stay pending a decision on the writ is imperative to prevent substantial—and, indeed, irreparable—harm.

ARGUMENT

I. THE REPUBLICAN COMMITTEES MEET ALL REQUIREMENTS FOR A WRIT OF SUPERSEDEAS.

The Republican Committees have compelling grounds for the Court to reverse the Court of Appeals' October 19 order and grant a writ of supersedeas. *See generally*, *Craver v. Craver*, 298 N.C. 231, 237–38 (1979) (A writ of supersedeas's purpose is to "preserve the Status quo pending the exercise of appellate jurisdiction."). North Carolina Rule of Appellate Procedure 23 provides that "[a]pplication may be made to . . . to stay the . . . enforcement of any judgment . . . which is not automatically stayed by the taking of appeal when an appeal has been taken" and where "a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied." N.C. R. App. P. 23(a)(1).[10] If the applicant satisfies these requirements, it must include "a statement of reasons why the writ should

[10] The Republican Committees fulfilled the condition of first submitting their petition to the Court of Appeals. *See* N.C. R. App. P. 23(a)(2).

issue in justice to [him]." N.C. R. App. P. 23(c).[11] The Republican Committees satisfy each requirement. In determining the "in justice" requirement, courts must balance: (1) the petitioner's likelihood of success on the merits of the appeal; (2) whether irreparable injury will occur absent a stay, and (3) whether the balancing of the equities supports temporary relief preserving the status quo during the appeal. *See Abbott v. Highlands*, 52 N.C. App. 69, 79 (1981) (stay appropriate where "there [was] some likelihood that plaintiffs would have prevailed on appeal and thus been irreparably injured"); *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19 (1997) (stay appropriate where failure to stay enforcement "would work a substantial injustice"). Each of these factors weighs in favor of issuing a writ of supersedeas suspending enforcement of the Consent Judgment pending appeal.

A. The Republican Committees Are Likely To Prevail on Their Appeal.

1. Only a Three-Judge Court Has Authority to Approve the Consent Judgment.

First, before the Consent Judgment was announced, Plaintiffs (joined by BOE) persuaded the Superior Court to deny a request to refer the case to a three-judge panel as required by N.C.G.S. § 1-81.1 (a1). *See also* N.C.G.S. § 1-267.1(c). The BOE and the Plaintiffs argued that a three-judge panel was unnecessary because this case is an "as-applied" challenge to the enforcement of otherwise constitutional laws in the context of the COVID pandemic and alleged issues with the United States Postal Service. Leland Decl., Ex. 22, BOE Opp. at 23-27; *Id.*, Ex. 23, Plaintiffs' Opp. at 17-25.

This was a stark reversal from the BOE's prior position. The BOE had previously argued successfully in a very similar case that a three-judge panel *was* required. In *Chambers,* as here, the Complaint sought relief based on COVID-19 and was purportedly limited to the 2020 general

[11] *See also* N.C. R. App. P. 23(c) (noting the application "may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31").

election. *Id.*, Ex. 24, *Chambers* Compl., at 39, Prayer for Relief (requesting that the court "[d]eclare . . . that the Witness Requirements are unconstitutional and invalid ***during the COVID-19 pandemic***") (emphasis added). Nevertheless, the BOE successfully argued that the *Chambers* Complaint asserted a facial challenge because HB 1169 *is itself limited to the 2020 election and the circumstances of COVID-19*. Leland Decl., Ex. 25, *Chambers v. North Carolina*, No. 20-CVS-500124, BOE Opp. to Preliminary Inj., at 1 (Aug. 26, 2020). HB 1169 explicitly states that its changes are "For an election held in 2020." HB 1169. *See* Leland Decl., Ex. 26, *Chambers*, 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Aug. 28, 2020) ("The Court finds the Complaint raises only facial challenges to the constitutionally of an act of the General Assembly."). The three-judge panel in *Chamber*s denied all relief on September 3 based on the imminence of the election and the disruption changes to the election code would cause at that late date. That was over six weeks ago. Accordingly, as in *Chambers*, the Plaintiffs (and now the BOE) seek to modify that statute in *all its applications*, and such a request is within the exclusive jurisdiction of a three-judge court.

2. <u>The BOE Lacks Statutory Authority To Implement Policies that Would Violate North Carolina's Elections Laws.</u>

Second, by approving the Consent Judgment, the Superior Court authorized the BOE—through the Memos—to implement absentee voting procedures that are inconsistent with multiple provisions of the election code. North Carolina's statutes prohibit the BOE from implementing rules and regulations that "conflict with any provisions of this Chapter." *See* N.C.G.S. § 163-22(a). Moreover, the code instructs that BOE "shall compel observance of the requirement of the election laws by the county boards of elections and other officers." *See id.* § 163-22(c). Notwithstanding these statutory limitations, the Consent Judgment instructs county boards of elections to ignore absentee voting requirements and replace them with the BOE's more lenient voting procedures.

The BOE cannot overcome that statutory language by claiming that it acted within the scope of its authority under N.C.G.S. §§ 163-22.2 and 163-27.1. Leland Decl., Ex. 22, BOE Br. at 37. N.C.G.S. § 163-27.1(a) allows the BOE to exercise "emergency powers," but those "Emergency Powers are limited to an election 'in a *district* where the *normal schedule* for the election is disrupted.'" *Moore*, 2020 WL 6063332, at *28 (quoting N.C.G.S. § 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." *Id.* More fundamentally, the General Assembly directly addressed the COVID-19 pandemic in HB 1169; BOE cannot use the very same "emergency" to override the General Assembly's response to the COVID-19 pandemic.

N.C.G.S. § 163-22.2 also does not apply here. That provision permits the BOE to implement "reasonable interim rules and regulations" for a pending general election only in response to a judicial decision striking down a portion of North Carolina's election statutes as "unconstitutional or invalid." N.C.G.S. § 163-22.2. But no court has held a relevant statute unconstitutional or invalid. To the contrary, both Judge Osteen in *Democracy N.C.* and the three-judge panel in *Chambers upheld* the absentee voting requirements that the BOE now seeks to nullify. *See Democracy N.C.*, 2020 WL 4484063, at *64; *Chambers,* No. 20-CVS-500124, Order at *6. Moreover, upon such a finding of invalidity, the statute authorizes the BOE "*also*" to "enter into agreement with the courts" only if doing so would avoid "protracted litigation." This provision does not apply to this fast-moving litigation about an imminent election. Even if those conditions were satisfied, however, the BOE's actions would still violate N.C.G.S. § 163-22.2, which reiterates that the BOE lacks the authority to implement "interim rules and regulations" that "*conflict with any provisions of Chapter 163 of the General Statutes.*" (emphasis added).

Moreover, the BOE's action flies in the face of controlling precedent, which it again ignored in its briefing before the Court of Appeals. In *James v. Bartlett*, 359 N.C. 260 (2005), this Court rejected a decision by BOE to ignore the election code by counting provisional ballots cast in the wrong precinct. This Court held that "[t]o permit unlawful votes to be counted along with lawful ballots in contested elections effectively 'disenfranchises' those voters who cast legal ballots." *Id*. at 644. *James* makes clear that BOE is constrained by the express terms of the statutes, even when voters make unintentional mistakes. The opinion vindicates the settled rule that the legislature's core legislative power is not delegable. *See also Adams,* 295 N.C. at 696 (holding the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency).

3. The Consent Judgment Is Not Fair, Adequate, and Reasonable.

Third, the Superior Court failed to ensure that the Consent Judgment is "fair, adequate, and reasonable." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999). The Consent Judgment gives Plaintiffs nearly all relief requested, including extension of the Receipt Deadline, elimination of the Postmark Requirement, and neutralization of the Ballot assistance and delivery Harvesting Bans.[12] The unfairness of this deal is exacerbated by its timing—against the admonitions in *Democracy N.C.* and *Chambers*—because it would impose new rules on prospective absentee voters in North Carolina while throwing the system into chaos. The Consent Judgment would accordingly grant relief that is grossly disproportionate to the strength of Plaintiffs' case. Most notably, a federal district court in *Democracy N.C.* (on August 4) and a three-judge court in *Chambers* (on September 3) had already rejected many of the Plaintiffs'

[12] That Plaintiffs did not receive everything they wished for, including relief that is impractical at this late date, such as prepaid postage for absentee ballots, hardly demonstrates that the deal is fair, reasonable, or arms' length.

claims, and both courts had warned weeks before the Consent Judgment that *it was too late to make such changes to the election laws*. Leland Decl., Ex. 8, *Chambers*, No. 20-CVS-500124, Order at *6; *Democracy N.C.*, 2020 WL 4484063, at *64. Indeed, long after hundreds of thousands of absentee ballots have been cast, the last-minute extension of the receipt deadline to *nine days* after Election Day, as provided in Numbered Memo 2020-19, directly "contravenes the express deadline established by the General Assembly," *Moore*, 2020 WL 6063332, at *19, and directly negates the statutory *three-day deadline*.

4. The Consent Judgment Violates the U.S. Constitution.

Elections and Electors Clause. The BOE opposed the Republican Committees' arguments regarding the Elections and Electors Clauses of the United States Constitution in the Court of Appeals because: (1) the Republican Committees lack standing, as intervenors, to make that argument; and (2) the BOE acted within the authority delegated to it by the North Carolina General Assembly. Leland Decl., Ex. 22, BOE Br. at 31-42. Neither argument has merit.

The Republican Committees—or, at the very least, the Legislative Defendants, who are also appealing—have met that standing requirement. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) (if no party appeals a decision, "an intervenor must independently demonstrate standing" to appeal it). The Republican Committees have sustained injury because the arbitrary and disparate procedures set forth in the Consent Judgment undermine their investments in educating voters about the statutory procedures. *See* Rep. Committees' Pet. for Writ of Supersedeas at 2; *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Notably, the Republican Committees' standing is at least equivalent to that of the Alliance, which claimed standing to challenge the statutes based on its voting membership. The Republican Committees also have a representational interest for like-minded voters who have shouldered the very burdens the Alliance

Plaintiffs claim are unconstitutional. In addition, the Committees represent Republican local, state, and national candidates, who will be harmed by confusion of voters and administrators, and who also bear the risk of post-election controversies.

The BOE's arguments against standing are based on federal caselaw addressing the narrower concept of Article III standing—not applicable to North Carolina courts. *See* Leland Decl., Ex. 22, BOE Br. at 32–33; *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) ("[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, [the] State's standing jurisprudence is broader than federal law."). "The 'gist of the question of standing' under North Carolina law is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Harper v. Lewis*, 2019 N.C. Super. LEXIS 122, *6-7 (Oct. 28, 2019) (quotation omitted). The Republican Committees, and the voters and candidates they represent, are directly and seriously injured by the BOE's usurpation of the General Assembly's authority: as this Court stated in *James*, allowing votes that do not comply with the election code harms all voters who vote by the rules.

Equal Protection Clause. The implementation of the Numbered Memos violates the Equal Protection Clause, which guarantees the right for each voter to have his or her vote counted on an equal basis. In *James v. Bartlett* this Court ruled against the BOE's decision, in contravention of the election code, to count provisional ballots cast in the wrong precincts, that "effectively 'disenfranchise[d]' those voters who cast legal ballots, at least where the counting of unlawful votes determines an election's outcome." 359 N.C. at 270. As Judge Osteen ruled in *Moore v. Circosta*, the BOE "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." 2020 WL 5880129, at *7. Arbitrarily imposing multiple sets of voting rules violates this right, as the U.S. and North Carolina Supreme Courts have determined. *See Gore*, 531 U.S. at 104-05; *Carr*, 369 U.S. at 208; *James*, 359 N.C. at 270. A writ of supersedeas is warranted to protect the integrity of duly-enacted election statutes, to preserve the status quo, and to protect the constitutional rights that two courts have already found would be violated if the Consent Judgment becomes effective.

B. Irreparable Injury Will Result Absent a Stay.

A stay is necessary to prevent the irreparable harm of allowing invalid votes to be cast and counted in the upcoming election. Judge Osteen already concluded the challenged Memos violate the Equal Protection Clause because they cause "disparate treatment, as [certain] voters . . . . returned their ballots within the time-frame permitted under state law . . . but other voters [would] . . . have an additional six days to return their ballot." *Moore*, 2020 WL 6063332, at *1. He further concluded that these harms were likely irreparable. Judge Dever reached a similar conclusion hours after the Consent Judgment was approved. *See Moore*, 2020 WL 5880129. The Republican Committees will also sustain irreparable injury because the arbitrary and disparate procedures undermine their millions of dollars of investments to educate voters about the statutory procedures. *See Gore*, 531 U.S. at 104–05; *Sanders*, 372 U.S. at 379–80; *Carr*, 369 U.S. at 208.

C. With Less Than Two Weeks Until Election Day, the Equities Require That the Consent Judgment Be Stayed and the Status Quo Be Preserved.

1. A Stay Is Consistent with Other Courts' Rulings.

Until Judge Collins's decision to approve the Consent Judgment, every court to examine these issues has concluded that the BOE should not undertake major changes to the procedure for absentee voting this close to the election. The Middle District of North Carolina already rejected

many of the Plaintiffs' claims in its August 4 order, while recognizing that it was too late to make changes to North Carolina's election laws. *See Democracy N.C.*, 2020 WL 4484063, at *64. On September 3, a day before absentee voting began, a three-judge panel of the Wake County Superior Court expressed this same concern when it unanimously denied a motion to enjoin North Carolina's requirement that one person witness an absentee ballot. Leland Decl., Ex. 26, *Chambers,* No. 20-CVS-500124, Order at *6, 7 (changing the law as of September 3 "would likely ***lead to voter confusion*** about the process for voting by absentee ballots") (emphasis added). The BOE has ignored *Chambers* in its briefs before the Superior Court and the Court of Appeals, and has never explained why putting extensive changes into effect *two weeks before the election* would be less disruptive than the more modest changes rejected in *Chambers two months before the election*.

In their lower-court briefing, Plaintiffs relied on decisions from other states granting injunctions against various election law requirements. They failed to mention, however, that those decisions are not faring well on appeal. *See, e.g.*, *Andino v. Middleton*, No. 20A55, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 2020) (staying injunction against South Carolina's witness requirement). For example, appellate courts at the state and federal level have reversed lower-court decisions purporting to extend the receipt deadlines for absentee ballots. *See, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-28-35, 20-2844, Dkt. 76, at *3 (7th Cir. Oct. 8, 2020) (per curiam) (staying lower court's extension of Wisconsin's voter registration and absentee ballot receipt deadlines)*; Ariz. Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020) (staying district court's order enjoining Arizona's absentee ballot signature deadline); *New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *1 (11th Cir. Oct. 2, 2020) (staying injunction because lower court "manufactured its own ballot

deadline so that the State [of Georgia was] required to count any ballot that was both postmarked by and received within three days of Election Day").

These decisions are all consistent with warnings by the three-judge court in *Chambers*, as well as the United States Supreme Court, which has repeatedly admonished that courts must consider how rulings issued just "weeks before an election" could "result in voter confusion." *Purcell*, 549 U.S. at 4–5. This risk increases and becomes weightier "[a]s an election draws closer." *Id*. at 5. Indeed, the Supreme Court repeated its instruction on October 5 by staying an injunction against South Carolina's witness requirement for absentee ballots. *See Andino,* 2020 WL 5887393, at *1. Although *Purcell* and *Andino* addressed decisions by lower federal courts, their admonition against changing state election statutes close to an election are no less applicable here. Indeed, the three-judge court in *Chambers* identified these very concerns as an independent basis for refusing to negate the Witness Requirement. If it was too late for changes on September 3 when the *Chambers* court issued its decision, it is certainly too late now—six weeks later.

2. The Public Interest Weighs Heavily in Favor of a Stay.

First, the BOE argued before the Court of Appeals that its recent decision (now abandoned) to stop processing absentee ballots is a valid basis for vacating the stay. BOE Opp. at 2–3. As of October 18, 2020, BOE unilaterally implemented version three of Numbered Memo 2020-19. This new guidance provides for a cure process without undermining the statutory witness requirement. *See* Leland Decl., Ex. 27, October 18 Ltr. The BOE could have taken this action two weeks ago but resisted while contending (inaccurately) that the Legislative Intervenors and the Republican Committees were responsible for the lack of a cure process.

Second, the Consent Judgment will violate the Equal Protection rights of those who voted by absentee ballot before the terms became effective by imposing arbitrary and differential treatment on them in contrast to those who vote by absentee ballot after the terms become effective.

As Judge Osteen concluded, the Memos "appear to be clear violations" of the Equal Protection Clause in the U.S. Constitution. *Moore*, 2020 WL 6063332, at *1. These considered decisions by two respected federal judges plainly show that the issues presented are substantial and that the Republican Committees have a high likelihood of prevailing.

Third, as shown (pp. 13–14), denying the stay and allowing the Consent Judgment to continue in effect, is causing mass confusion for voters and confusion and administrative nightmares for county boards of elections. The BOE, the Republican Committees, and other organizations have been instructing voters on how to correctly submit absentee ballots in compliance with the election statutes since before September 4 when the first absentee ballots were mailed to voters. The absentee ballot packages themselves contain instructions inconsistent with the challenged Memos. *See* Leland Decl., Ex. 6, *Democracy N.C.*, No. 1:20-cv-00457, Absentee Ballot Envelope, Dkt. 115-2 (July 27, 2020) (requiring witness signature and "postmark" by November 3). The BOE's own website currently instructs voters that absentee ballots "must be postmarked by November 3, 2020 and received by November 6, 2020."[13] Challenged Memo 2020-22 countermands this instruction. As of September 22, the day the first of the Memos was issued, 153,664 absentee ballots had been cast.[14] That number is now 626,781. *Id*. (Oct. 20, 2020). The Consent Judgment would dramatically alter material aspects of these instructions. It is unreasonable on an operational level for county boards of elections and their staffs to make these changes and for voters to have confidence in such an arbitrary system. Moreover, the extension of the receipt deadline from the statutory three days after Election Day to nine days gives

[13] *See* Leland Decl., Ex. 28, https://www.ncsbe.gov/voting/vote-mail/detailed-instructions-voting-mail#returning-a-ballot (last accessed Oct. 21, 2020).

[14] *See* https://dl.ncsbe.gov/?prefix=Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/.

procrastinating voters another excuse to wait, and perhaps miss the postmark deadline, or may mislead voters if it turns out that the extension is overturned on appeal before Election Day. *Cf. Common Cause v. Thomsen*, 2020 WL 5665475, at *2 (W.D. Wisc. Sept. 23, 2020) (noting risk).

Finally, the BOE's concerns about the United States Postal Service's ability to deliver mail in a timely fashion in North Carolina is unsupported. BOE Br. at 10-11. As of now, over a million North Carolinians have succeeded in returning their absentee ballots through the mail. The concerns raised by BOE arise (if at all) only when a voter waits until Election Day to mail his or her completed ballot; any voter who waits that long may also return the ballot in person. N.C.G.S. § 163-231(b)(1). Even if a voter does wait until the last permitted hour of election day to mail his or her ballot, data show that (i) in the second quarter of 2020—during the COVID-19 pandemic—USPS delivered 95% of North Carolina mail within two days, (ii) mail volumes are significantly down during the pandemic, and any increase due to mail-in voting will be infinitesimal in relation to the normal volume of mail handled by USPS, (iii) USPS has procedures in place to deal effectively with election mail. Leland Decl., Ex. 29, Plunkett Aff. ¶14. Although in the Court of Appeals the BOE quoted extensively from the *DeJoy* litigation in Pennsylvania, it strikingly neglected to tell the Court that the district court *enjoined* the administrative changes at issue in that case through the election, so they are no longer of concern. *Commonwealth of Pa. v. DeJoy*, No. 20-4096, 2020 WL 5763553, at *44 (E.D. Pa. Sept. 28, 2020) (granting nationwide injunction against changes that would have caused delays, including the prohibition on late or extra trips by postal workers and limits on overtime). Finally, while true that the election code allows ballots postmarked by election day from overseas and military voters six additional days to arrive, that additional time is in recognition of the unique difficulties faced by those voters. Leland Decl., Ex. 30, Lockerbie Aff. ¶ 32. When it revised the election code in June, the General Assembly elected

not to revise the Ballot Receipt Deadline for domestic voters. Doing so would once again place overseas and military voters at a comparative disadvantage, which would be inappropriate. *Id.*

II. REQUEST FOR STAY PENDING A DECISION ON PETITION FOR WRIT OF SUPERSEDEAS.

For the reasons set forth in Part I, *supra*, the Republican Parties further request that the Court enter an order temporarily staying enforcement of the Superior Court's October 2, 2020 Order pending a decision on their petition for writ of supersedeas. *See* N.C. R. App. P. 23(e). The Republican Parties further submit that the impending election provides good cause for the Court to issue a stay *ex parte*.

CONCLUSION

The Republican Committees respectfully request that this Court grant their petition and motion and (1) temporarily stay enforcement of the Superior Court's October 2, 2020 Order during review of the petition for writ of supersedeas; and (2) issue a writ of supersedeas suspending the Superior Court's October 2, 2020 order.

Respectfully submitted this the 21st day of October, 2020.

By: *<u>/s/ Electronically Submitted</u>*

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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VERIFICATION

Pursuant to Rule 23(c), I have read the foregoing and pursuant to Appellate Rule 23, I hereby certify that the material allegations and contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

/s/ Electronically Submitted
R. Scott Tobin

CERTIFICATE OF SERVICE

I certify that I have on this 21st day of October, 2020, served a copy of the foregoing by email and United States mail, postage prepaid, to counsel for the Plaintiffs, Defendants, and Intervenor-Defendants at the following addresses:

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The Washington Post
Democracy Dies in Darkness

Key swing states vulnerable to USPS slowdowns as millions vote by mail, data shows

Battlegrounds that may decide the presidency have some of the nation's most erratic mail service, which has particular implications for states with firm ballot deadlines

By **Jacob Bogage** and **Christopher Ingraham**

Oct. 20, 2020 at 12:52 p.m. EDT

Key swing states that may well decide the presidential race are recording some of the nation's most erratic mail service as record numbers of Americans are relying on the U.S. Postal Service to deliver their ballots, agency data shows.

Consistent and timely delivery remains scattershot as the mail service struggles to right operations after the rollout, then suspension, of a major midsummer restructuring. In 17 postal districts representing 10 battleground states and 151 electoral votes, the average on-time delivery rate for first-class mail is 83.9 percent — 7.8 percentage points lower than in January and nearly two points below the national average. By that measure, more than 1 in 6 mailings arrive outside the agency's one-to-three-day delivery window.

The slowdowns, which have raised alarms and suspicions among voters, postal workers and voting experts, have particular implications for states with strict voter deadlines. Michigan, Wisconsin and Georgia, for example, do not accept ballots that arrive after Election Day, regardless of the postmark. Of the states that do, there is generally a short qualifying window: In North Carolina, where polls have President Trump and Democratic nominee Joe Biden in a dead heat, postmarked ballots must arrive within three days of the election.

"There are fundamental and foundational issues with the Postal Service that go beyond voting, and there are issues with election administration that we can address," said David Becker, executive director of the nonpartisan, nonprofit Center for Election Innovation and Research. "But the rules we have for the next 14 days are the rules we have."

There are always variabilities in the mail, he said. "There have always been states that have firm deadlines after which no more ballots will be accepted. There has always been an element of voter responsibility along with responsibility of election officials and the Postal Service. And voters are embracing that responsibility."

In Detroit, where Democrats are relying on heavy turnout to carry the rest of Michigan, only 70.9 percent of first-class mail was on time the week that ended Oct. 9, compared with 92.2 percent at the start of the year.

In Wisconsin — which struggled mightily with a vote-by-mail primary in August — on-time delivery fell to 84.3 percent in the Lakeland district, which encompasses most of the state. In North Carolina's Greensboro district, which includes Raleigh and Durham, service was 10.1 percentage points lower than it had been in January. Timeliness also varied widely in postal districts in Pennsylvania and Florida.

Postal Service spokesman David Partenheimer said the agency has maintained performance standards despite surging

of the best on-time rates in the country. The on-time rate of 89.4 percent exceeds the national average. The Central Pennsylvania district, a Republican stronghold, has an 83.2 percent on-time rate.

But the Philadelphia Metro district, which Democrats need to dominate to offset GOP votes in the rest of the state, is one of only six districts in the country with on-time service below 80 percent. Staffing shortfalls remain a chronic issue, according to postal employees in the state. In Philadelphia, workers are preparing to cull ballots, process them by hand and deliver them to local election officials to avoid having to send them to regional processing plants, where the sorting system moves slower.

"It's hard to tell a voter with certainty," said David Thornburgh, president of the local good-government group Committee of Seventy, "how long it will take the post office to deliver their ballot."

Updated October 9, 2020

Voting in the 2020 U.S. Election

What you need to know: How to make sure your vote counts in November | Absentee ballots vs. mail-in ballots | How to track your vote like a package | How to prevent your mail ballot from being rejected | Where Biden and Harris stand on voting issues | Google allows ads with 'blatant disinformation' about voting by mail

U.S. Postal Service: USPS on-time performance dips again as millions prepare to mail 2020 ballots | Chronic USPS delays in Detroit undermine voters' confidence in voting by mail | Postal Service backlog sparks worries that ballot delivery could be delayed in November | Why the USPS wanted to remove hundreds of mail-sorting machines | Can FedEx and UPS deliver ballots? | Newly revealed USPS documents show the agency's 2020 ballot pressures, uncertainty

Map: Which states can cast ballots by mail

Are you running into voting problems? Let us know.

EMERGENCY ORDER – Updated 11/5/2018
G.S. § 163A-750; 08 NCAC 01.0106

1. Hurricane Florence ("Florence") made landfall on or about September 14, 2018, severely damaging persons and property across eastern North Carolina. The President of the United States declared a Major Disaster and the Governor of North Carolina declared a State of Emergency and called a special session of the General Assembly that convened October 2, 2018.

2. Session Law 2018-134 enacted a process by which county boards of elections could relocate voting sites affected by Florence, allocated funding for a public information campaign to highlight registration and voting options, and extended the voter registration deadline in the following thirty-four (34) counties (the "Affected Counties"):

Beaufort	Johnston	Sampson
Bladen	Jones	Scotland
Brunswick	Lee	Wayne
Carteret	Lenoir	Wilson
Columbus	Moore	
Craven	New Hanover	*Anson*
Cumberland	Onslow	*Chatham*
Duplin	Pamlico	*Durham*
Greene	Pender	*Guilford*
Harnett	Pitt	*Orange*
Hoke	Richmond	*Union*
Hyde	Robeson	

3. The State Board of Elections & Ethics Enforcement ("State Board") staff continue to monitor the effect of Florence across the State and remain in communication with disaster response teams, the U.S. Postal Service, and county elections administrators.

4. The State Board convened in open session on October 17, 2018. During that meeting, members of the State Board and the Executive Director discussed the effects of Florence on voting populations and the November 6, 2018 general election.

5. Statute provides that the Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in districts where the normal schedule has been disrupted by a natural disaster. G.S. § 163A-750(a)(1). The

exercise of such powers must avoid unnecessary conflict with existing law. G.S. § 163A-750(a).

6. Administrative rules authorized by the State Board, adopted by the Executive Director, and approved by the Rules Review Commission provide standards for the exercise of emergency powers. *See* 08 NCAC 01.0106. Pursuant thereto, the Executive Director finds the following:
    a. 08 NCAC 01.0106(a): Florence and its aftermath have disrupted the normal schedule for the election and impaired critical components of election administration by displacing persons, damaging property, and affecting mail delivery, which have cumulatively impaired voting opportunities in Affected Counties and absentee voting processes more broadly.
    b. 08 NCAC 01.0106(b)(1)(A): Hurricane Florence is a qualifying natural disaster permitting the Executive Director to assess the propriety of emergency action.
    c. 08 NCAC 01.0106(c): The Executive Director has shaped the exercise of emergency power having considered the following:
        - 08 NCAC 01.0106(c)(1): The geographic scope of disruption is limited to the Affected Counties identified by the President of the United States as within a Major Disaster area and targeted specifically by Session Law 2018-134. Remedial action as to absentee ballot delivery, however, cannot be limited to the recipient Affected County, because mail transit routes and/or delays may affect the delivery of ballots sent from any location to either an Affected County or a non-affected county.
        - 08 NCAC 01.0106(c)(2): Select contests span both affected and non-affected areas and include statewide ballot items. The considered exercise of power works to preserve the rights of candidates and voters participating in contests that span affected and non-affected areas.
        - 08 NCAC 01.0106(c)(3): More than one month has passed since Florence made landfall, and the disruption in advance of Election Day is highly foreseeable. The State Board has also invested heavily in advertising campaigns communicating the registration and voting options available this election. Nevertheless, the types of disruptions addressed by the exercise of emergency power contained in this Order are not adequately remedied by increased public awareness.
        - 08 NCAC 01.0106(c)(4): Alternative registration options were made available in Affected Counties by special enactments that extended the voter registration deadline. S.L. 2018-134, § 5.3.(a). The General Assembly additionally directed procedures by which county boards may relocate early voting sites and Election Day precinct locations. Early voting has not been suspended based

upon the disruption, and same-day registration remains available to individuals who appear during the early voting period. Registrants may present proof of residency using an electronic document. Voters displaced outside of their county of registration are able to request an absentee ballot sent to the address of their choosing. Accordingly, registration and voting opportunities remain available.

- 08 NCAC 01.0106(c)(5) and 01.0106(c)(6): The duration of disruption is ongoing and residents and voters remain displaced. Media reports indicate thousands remain displaced due to Florence. *See* Jason DeBruyn, "FEMA Brings Trailers to NC For Temporary Housing", *WUNC* (October 18, 2018). Additionally, FEMA has announced temporary housing services. FEMA, "Direct Temporary Housing for North Carolina Disaster Survivors", Release DR-4393-NC, (October 15, 2018). Displaced persons staying with family or friends may not be included in the count of those utilizing federal housing assistance. Some election workers cannot be reached or are no longer available to serve due to disruption, and in some precincts an insufficient number of elections officials are available to fill the positions of judge and chief judge.
- 08 NCAC 01.0106(c)(7): The General Assembly has approved processes that ensure secure voting locations. While access to some voting locations was a point of initial concern, the State Board staff remain in ongoing contact with county administrators who are best positioned to recommend any relocations to their respective county boards.
- 08 NCAC 01.0106(c)(8): The Executive Director transmitted correspondence to the Governor, President Pro Tempore of the Senate, and Speaker of the House on September 26, 2018, detailing current legal deadlines and administrative processes affecting voter registration, voting by mail, election workers, voting sites, and displaced voters. The letter also cited the administrative rule requiring consideration of the time remaining for the political branches to address disruptions. In the month since Florence made landfall, the General Assembly and the Governor have approved emergency legislation on three occasions: Session Laws 2018-134 (ratified October 2), 2018-135 (ratified October 2), and 2018-136 (ratified October 15).
- 08 NCAC 01.0106(c)(9): Emergency remedial measures contained in this Order do not erode election integrity and ballot security. All changes to absentee balloting involve administrative handling of absentee ballots while suspending no security requirements contained in current law.

- 08 NCAC 01.0106(c)(10): Emergency remedial measures are calculated to have minimal effect on certification deadlines in that no deadline extends beyond the deadline by which certain ballots from overseas and military voters must be accepted under current law.

7. In evaluating the disruption and establishing remedial effects, every effort has been made to treat similarly situated persons equally, while appropriately tailoring relief to offset the nature and scope of the disruption as required by law.

Based upon the foregoing findings and conclusions, and in exercise of G.S. § 163A-750 and 08 NCAC 01.0106, the Executive Director hereby **ORDERS**:

A. Civilian absentee ballots delivered by mail or commercial courier service to the appropriate county board of elections office in any of the twenty-eight Affected Counties shall be counted if received no later than 5 p.m. Thursday, November 15, 2018, if the container return envelope was postmarked on or before Election Day, November 6. This directive modifies the deadlines contained in G.S. § 163A-1310(b)(2) only, and in no other respect.

B. Any voter or other person authorized by law may deliver an absentee ballot in person to any early voting site or county board of elections office in the state; the absentee ballot must be delivered during the site or office's hours of operation and shall be considered timely if delivered by 5 p.m. on Election Day, November 6. County boards of elections must ensure delivery to the appropriate county board of elections office prior to canvass on November 16, 2018. This directive modifies restrictions as to the location of delivery in G.S. § 163A-1310 only, and in no other respect.

C. In any precinct in an Affected County where, due to the effects of Florence, the county board finds that an insufficient number of precinct officials are available to fill the majority of the three positions of chief judge and judge with residents of that precinct, the county board may appoint nonresidents of the precinct to a majority of the positions provided that the officials otherwise meet all requirements.

This the fifth day of November, 2018.

Kim Westbrook Strach
Executive Director
State Board of Elections & Ethics Enforcement

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July 17, 2020

EMERGENCY ORDER

ADMINISTERING THE NOVEMBER 3, 2020 GENERAL ELECTION DURING THE GLOBAL COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY

As Executive Director, acting pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01 .0106, I hereby find the following:

1. On March 10, 2020, the Governor issued Executive Order No. 116, declaring a State of Emergency in response to the public health emergency posed by Coronavirus Disease 2019 (COVID-19).

2. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

3. On March 13, 2020, the President of the United States issued an emergency declaration for all states, tribes, territories, and the District of Columbia, retroactive to March 1, 2020, and declared that the COVID-19 pandemic in the United States constitutes a national emergency.

4. On March 25, 2020, the President approved a Major Disaster Declaration, FEMA-4487-DR, for the State of North Carolina.

5. On May 20, 2020, the Governor stated in Executive Order 141 that "slowing and controlling community spread of COVID-19 is critical to ensuring that the state's healthcare facilities remain able to accommodate those who require medical assistance." Executive Order 141 further states that, due to the "continued community spread of COVID-19 within North Carolina," the State must "continue some measures to slow the spread of the virus during the pandemic."

6. Executive Order 141 notes the determination of public health experts that that "the risk of contracting and transmitting COVID-19 is higher in settings that are indoors, where air does not circulate freely and where people are less likely to maintain social distancing by staying six feet apart." Executive Order 141 also notes that "the risk of contracting and transmitting COVID-19 is higher in settings where people are stationary and in close contact for long periods of time" and "in gatherings of larger groups of people because these gatherings offer more opportunity for person-to-person contact with someone infected with COVID-19."

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KIM WESTBROOK STRACH
Executive Director

NUMBERED MEMO 2016-21

TO: County Boards of Elections
FROM: Kim Strach, Executive Director
RE: Voter Registration Processing and Election Observer Requirements
DATE: October 19, 2016

This memorandum provides guidance to address questions regarding voter registration and election observer requirements. For additional information on observer conduct, see Numbered Memo 2016-17 and Tips for Observers and Runners.

Voter Registration Deadline

We have received many questions about voter registration processing in light of the extension of the voter registration deadline in 37 counties. I am certain that many of you spent your weekend processing voter registration applications that were received by Friday, October 14. And, due to the mail delays associated with Hurricane Matthew, it is likely most counties will be processing voter registration applications through today. For those 37 counties with the extended voter registration deadline, it may be impossible to process applications received today before voting begins tomorrow. Additionally, voter registrations will be timely in those 37 counties if postmarked by today. If the postmark is missing or illegible on forms received in those 37 counties, the forms must be received in your office by Monday, October 24.

The grid below is meant to highlight the differences between the 37 Matthew counties and those counties that did not have an extended voter registration deadline (Non-Matthew counties).

	Matthew Counties	Non-Matthew Counties
Voter registration deadline	**10/19/2016**	**10/14/2016**
Source: received by mail with postmark date	Postmark dated 10/19/2016 or earlier	Ignore postmark date if received by 10/19/2016 (if received after 10/19/16 it must be postmarked by 10/14/16)
Source: received by mail with missing or illegible postmark date	Must be received by 10/24/2016	Ignore postmark date through receipt by 10/19/2016

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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.

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

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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).

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STATE BOARD OF ELECTIONS

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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).

Bench Memo
Tuesday, September 15, 2020
3 p.m. meeting

This will be a remote meeting using Cisco Webex. For the **open session**, you should have received an invitation with access for the meeting. You will need to have a microphone on your computer to participate. You can also join using the following link: https://ncgov.webex.com/ncgov/onstage/g.php?MTID=ed32d939d1696fb9345eed16a5363b108.

For the **closed session**, you should have received a second Cisco Webex invitation. When it is time for the closed session, fully close out of the open session and then log into the closed session. You can also access the meeting using the following link: https://ncgov.webex.com/ncgov/j.php?MTID=m7d2d355882525d07dfc63caf5af160fe

Meeting number: 171 884 6487
Password: g3DGu3735cm

Please contact Katelyn (864-357-3335) if there are any issues.

A copy of the meeting notice and tentative agenda, as well as a link to the documents, is available here.

Statement Regarding Ethics and Conflict of Interest

Authority

G.S. § 138A-15(e)

(e) At the beginning of any meeting of a board, the chair shall remind all members of their duty to avoid conflicts of interest under this

Subchapter. The chair also shall inquire as to whether there is any known conflict of interest with respect to any matters coming before the board at that time.

Counsel Note

Counsel has not been informed of any conflict in advance of this meeting.

Suggested Statement {Chair}

In accordance with the State Government Ethics Act, it is the duty of every Board member to avoid both conflicts of interest and the appearance of a conflict.

Does any Board member have any known conflict of interest or any appearance of a conflict with respect to any matters coming before the Board today? If so, please identify the conflict or appearance of conflict and refrain from any undue participation in the particular matter.

Approval of Prior Meeting Minutes

Materials

August 31, 2020 Open Session Meeting Minutes (draft)

August 31, 2020 Closed Session Meeting Minutes (attached to email)

Authority

G.S. § 143-318.10(e) (relevant portion)

(e) Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. …

Draft Motion

I move that we approve the State Board's open and closed session meeting minutes of August 31, 2020.

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Appointment to Vacancies on County Boards of Elections

Materials

Applications are available upon request (Bertie applications attached to email)

Authority

G.S. § 163-30(d) (relevant portion)

Whenever a vacancy occurs in the membership of a county board of elections for any cause the State chair of the political party of the vacating member shall have the right to recommend two registered voters of the affected county for such office, and it shall be the duty of the State Board to fill the vacancy from the names thus recommended.

Summary

We have received nominations from the Democratic Party as follows:

- McDowell County
    1. Michelle Wilson Price (Class 3 misdemeanor 20 years ago; no conflict indicated)
    2. Harriet Allen Rockett (no conflict indicated)
- Nash County
    1. Brenda Johnson Foster (no conflict indicated)
    2. Dr. Cassandra Stroud Conover (no conflict indicated)

We have received nominations from the Republican Party as follows:

- Person County
    1. David Harris Minshall (no conflict indicated)

2. Grace Anne Mattson (no conflict indicated)

Suggested Motion

I move that the State Board appoint _____ to the _____ County Board of Elections

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Closed Session

Authority

§ 143-318.11. Closed sessions.

(a) Permitted Purposes. - It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

…

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its

minutes as soon as possible within a reasonable time after the settlement is concluded.

…

(c) Calling a Closed Session. - A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

Counsel Note

As background for the closed session, there are 8 cases to be discussed in relation to possible settlement:

- Democracy North Carolina v. State Board of Elections
    1. A federal district court judge entered a preliminary injunction that requires a cure process for deficient absentee ballots and that allows one named plaintiff to receive help from a nursing home employee. The judge denied all of plaintiff's other requests
    2. Plaintiffs and the State Board have asked the judge to reconsider denial of the injunction to allow nursing home employees to assist voters due to the visitation restrictions subsequently issued by DHHS.
    3. This was the only lawsuit where plaintiffs sought to allow contactless drop boxes for in person return of absentee ballots. The judge denied this request.
- Chambers v. North Carolina
    1. A three-judge panel of the Wake County Superior Court unanimously denied the preliminary injunction motion, thereby declining to enjoin the witness requirement.
- Taliaferro v. State Board of Elections
    1. This case is pending in federal district court in the Eastern District of North Carolina. It challenges the failure to

provide a way for blind voters to vote absentee by mail independently, without depending on another person for assistance. In its brief, the State Board largely did not dispute plaintiffs' claim that the agency has failed to comply with the ADA and Rehabilitation Act requirements, due to applicable caselaw in the 4th Circuit. However, we do not believe it would not be administratively feasible to implement an accessible option safely for the November election due cyber security issues with online voting, changes to SEIMS, and implementing a new software program.

Marc Elias cases:

- North Carolina Alliance for Retired Americans v. State Board of Elections
    1. Raises challenges to the single witness requirement for single-person or single-adult households, the postage requirement, signature matching procedures, and the prohibitions on who can assist with and deliver an absentee request form.
    2. **A hearing on the preliminary injunction (PI) hearing is scheduled at 9:30 a.m. on September 18 before a single judge.**
- Stringer v. State Board of Elections
    1. The complaint raises various constitutional challenges to absentee voting requirements.
    2. There is a hearing scheduled on September 18 but it is not expected to include the PI motion on this case, because there is no dispute the case should go to a three-judge panel.
- North Carolina Democratic Party v. State Board of Elections
    1. This case was filed in 2019 and challenges various early voting restrictions. Awaiting appointment of a three-judge panel.
- Advance North Carolina v. State Board of Elections
    1. Challenges restrictions made by Session Law 2019-239 on who can make an absentee ballot request.
- Democratic Senatorial Campaign Committee v. State Board

1. This case was filed last week and challenges the requirement in Numbered Memo 2020-19 that a voter be issued a new ballot if the witness did not provide their name, address, or signature. The memo was issued to implement the injunction in the Democracy NC case.

The Department of Justice has recommended several areas for settlement in litigation against the State Board. In addition to their memo, board members may wish to consider the following information:

Absentee Ballot Return Deadline

- State law requires that ballots be postmarked after Election Day. This requirement is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, we are aware that the USPS does not postmark all ballots. Ballottrax now provides county boards and voters with status updates to track ballots in the mail stream. If a ballot was not postmarked, this information could be researched in Ballottrax to determine if there was affirmative information indicating that the ballot was mailed by Election Day.
- The Post Office continues to state that ballots may take up to a week to be delivered, but state law only allows ballots to be accepted that are received three days after the election.
- If the Executive Director's emergency powers are used to extend the receipt deadline for ballots, an emergency order requires consideration of the factors in the rule, which must be calculated to offset the nature and scope of the disruption, and consultation with the board. It also requires that there be a disruption to the election normal schedule for an election to trigger any use of emergency powers. 08 NCAC 01 .0106. At this time, the executive director would need to consider whether there enough information to determine the nature and scope of a potential disruption with mail service and to determine how long the deadline needed to be extended for. More specific information may be available closer to the mail deadline for absentee ballots. For more discussion on the emergency powers authority, see the section "In Person Return of Absentee Ballots" below. If this change were made as part of a

settlement agreement that was approved by the court, it would help protect the action from legal attack.

In Person Return of Absentee Ballots

- Voters may return their absentee ballots in person to either the county board of elections office or a one-stop site. They may not return them to an Election Day polling place.
- There has been a vast increase in the number of voters who are returning their absentee ballots in person. Approximately half of absentee ballots returned in the first week of voting were returned in person. Using a written log adds several minutes to the time that a voter must spend returning their ballot in person. Some county boards are providing drop off locations outside but for others this is not feasible.
- It is a Class I felony for any person other than the voter or their near relative or legal guardian take possession of a ballot for delivery to a voter or for return to a county board of elections. G.S. § 163-226.3(a)(5).
- In 2018, the State Board adopted a rule that requires logging of absentee ballots that are returned in person to the county board of elections office. 08 NCAC 18 .0102. The rule requires that the person delivery the ballot 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 de-livery 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. According to the rule and State Board guidance, 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.
    - The rule was adopted in part because of the illegal absentee ballot activity that took place in Bladen County in 2016. Previously, policy required that county boards log absentee ballots that were received in person, but not every county complied with this and the logs varied somewhat in what

was required. The logs that Bladen County used in 2018 were important to the CD9 investigation.
    - Keeping a detailed log may allow a county board to determine if there are patterns with absentee ballots being returned in person. It also creates a record of who dropped off the ballot in case there is a need to contact that person and the voter cannot be reached or does not know the contact information for that person. Relaxing or eliminating the written log could lead the public or candidates to question whether large numbers of ballots were returned illegally and could result in the filing of post-election litigation and election protests, ultimately calling into question the results of the election. Further, the written log is one of the security measures the State Board has cited to for why absentee voting is secure.
- By its language, the rule requiring a written log does not apply to one-stop sites, likely because voters rarely used this option in prior elections. The rule was previously interpreted as requiring that all absentee ballots be logged when they were returned in person, regardless of the location of return. It could be confusing to voters and county board staff and difficult to justify requiring logging at a one-stop site but not at a county board office, especially if the county board office is also a one-stop site.
- Absent a settlement agreement or court order, requiring only verbal confirmation at a county board office would require an emergency order because it is too late to change the rule before the election due to the extended amount of time that rulemaking takes. Any time the executive director exercises her emergency powers due to a pandemic-related issue, there is a risk of legal challenges, because the Rules Review Commission disapproved the temporary rule that would have clarified that it included a disease epidemic. Some groups, including the NCGOP, have laid out legal arguments that the RRC's disapproval means that the emergency powers cannot be used for a disruption related to the pandemic. While counsel believe that the permanent rule's language is sufficient, the usage of emergency powers must be weighed against possible litigation risk, or risk that the

legislature might act to repeal or further limit the statutory authorization for the executive director's emergency powers.

- There is one lawsuit, Democracy NC, that sought to allow contactless drop boxes for voters to return their absentee ballots. However, the judge denied this request. Therefore, it is unclear how or why the State Board would settle a claim about drop boxes when the judge already denied the claim, and this is not at issue in any other active lawsuit discussed in this memo. In the absence of a court order, the executive director would need to exercise emergency powers to lift the written log requirement at county board offices.

Witness Requirement

- Following the federal court order in *Democracy NC*, Numbered Memo 2020-19 was issued on August 21. It states that a missing voter signature or a voter signature in the wrong place on the absentee return envelope can be corrected by the voter signing a cure affidavit. The memo further provides that missing witness information (name, address, signature) cannot be cured and if a ballot is missing this information the county board will spoil the ballot and issue the voter a new ballot.
- Once absentee ballots started being returned, county boards provided feedback that some voters were confused by the highlighting on the witness section. The section the witness is to complete is grey, but the witness signature box is light yellow, so some witnesses only signed but did not provide their name and address. In response, State Board staff began considering whether witness name and address could be provided by the voter in a cure affidavit, if the voter knows that information. The law requires that this information be provided but does not prohibit the voter from providing it. However, for ballots missing the witness signature, voters would still be reissued a new ballot, since the voter cannot sign and attest for the witness. State Board staff also considered allowing the voter to cure the missing witness signature by affidavit by having the witness and voter sign the affidavit; however, this places additional burden on the voter because the same witness who observed the voter marking their ballot may no longer be available or the voter may no longer

have access to that person. Issuing the voter a new ballot in the case of a missing witness signature would give the voter the opportunity to have a different person witness the reissued ballot.

- Last Friday, staff sent county boards of elections an email instructing them not to send voters any cure affidavits or to spoil any ballots and reissue a new ballot. County boards were told that the Numbered Memo 2020-19 was being updated and would be reissued with updated cure letters by the end of the day. Because of the board meeting scheduled for Tuesday, the numbered memo update could not be finalized and therefore county boards are not currently following up with voters whose ballots have missing information.
- Numbered Memo 2020-19 states that a county board shall not use signature verification to compare the voter's signature on the absentee envelope with the signature on file for the voter. It explains: "Verification of the voter's identity is completed through the witness requirement."
- If the witness requirement is allowed to be cured by the voter submitting an affidavit, consider whether the voter would be allowed to submit the affidavit simultaneously with the ballot. And if so, consider how to know that the voter is the person who voted the absentee ballot or who filled out the cure affidavit. 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.

Other Considerations

Because of the pandemic, the absentee process is under much more scrutiny this year than it has been previously. Political parties, advocacy groups, candidates, and the public are closely monitoring how these processes are carried out and how county boards ensure that all voters can safely cast their votes in a fair and accurate election. And the pandemic has led to a number of lawsuits, which have caused uncertainty for voters and from an election administration standpoint.

When considering a settlement agreement, the board may wish to consider what the court might order to determine whether settlement is

more advantageous. Consider what specifically a court might order, when it might be ordered, and whether settling now is more favorable, in light of all factors. Settlement would provide certainty sooner than waiting for a court order and would give the State Board more control over what changes were made. The board may also want to consider if the settlement terms are acceptable and whether it is preferable to decide now or to await the courts. Additionally, the board may wish to consider the effect of settlement of several of these issues simultaneously; for example, if there any compounding effects to the absentee process if a voter is allowed to cure a missing witness signature and the log requirement is also relaxed. Also, the legislature is a party to a number of the cases discussed in this memo and that they may oppose settlement. The courts have approved settlement without the legislature's consent in past cases against other state entities, so this may not be a barrier.

Finally, one other matter to note is the constitutional and statutory provisions that give the General Assembly—not the courts—the authority to determine the outcome of a contested election for Council of State offices. See Article VI, § 5 of the NC Constitution. Pursuant to G.S. § 163-182.13A, "contest" means "a challenge to the apparent election for any elective office established by Article III of the Constitution [Council of State offices] or to request the decision of an undecided election to any elective office established by Article III of the Constitution…" A decision of the General Assembly in determining the contest of the election is not reviewable by state courts. Legal questions about how to count out-of-precinct provisional ballots led to the General Assembly to decide the outcome of the Superintendent of Public Instruction after the 2004 election. See this article by Bob Joyce for additional description of the dispute. When the governor's race was close in 2016, it was thought that the General Assembly might take jurisdiction over it, but that did not happen.

Suggested Motion

I move that the State Board go into closed session pursuant to G.S. § 143-318.11(a)(3) to receive legal advice from its attorneys in the following cases:

- *North Carolina Democratic Party v. State Board of Elections*
- *Advance North Carolina v. State Board of Elections*
- *Chambers v. North Carolina*
- *Stringer v. State Board of Elections*
- *North Carolina Alliance for Retired Americans v. State Board of Elections*
- *Democracy North Carolina v. State Board of Elections*
- *Taliaferro v. State Board of Elections*
- *Democratic Senatorial Campaign Committee v. State Board*

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Delegation of Settlement Authority to the Executive Director

Authority

§ 163-26. Executive Director of State Board of Elections.

There is hereby created the position of Executive Director of the State Board, who shall perform all duties imposed by statute and such duties as may be assigned by the State Board.

Suggested Motion

I move that the State Board delegate settlement authority to its Executive Director for the following cases: [List cases]

Roll Call Vote

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

Adjournment

Suggested Motion

I move that the State Board adjourn.

Roll Call

Dr. Anderson
Mr. Black
Mr. Carmon
Mr. Raymond
The Chair

The latest news on the 2020 presidential election

DECISION 2020

Florida Extends Deadline After Crash of Voter Registration Site

Investigation underway after system had issues on final day to register to vote in state

Published October 6, 2020 • Updated on October 6, 2020 at 8:12 pm

2:35

Florida Voter Registration Extended to Tuesday Evening

Gov. Ron DeSantis is extending the voter registration deadline here in Florida after the state's website crashed. NBC 6's Steve Litz reports.

Florida Gov. Ron DeSantis extended the state's voter registration deadline Tuesday after unexpected and unexplained heavy traffic crashed the state's online system and potentially prevented thousands of enrolling to cast ballots in next month's presidential election.

DeSantis extended the deadline that expired Monday until 7 p.m. EDT Tuesday. In addition to online registration, DeSantis ordered elections, motor vehicle and tax collectors offices to stay open until 7 p.m. local time for anyone who wants to register in person.

"You can have the best site in the world, but sometimes there are hiccups," DeSantis said during a press conference at The Villages, a large retirement community in central Florida. "If 500,000 people descend at the same time, it creates a bottleneck."

11 HOURS AGO

Pedestrian Hit, Killed by Truck in Hollywood

The state is investigating why its voter registration system crashed on Monday, saying unexpectedly heavy traffic that can't be immediately explained poured in during the closing hours.

With COVID-19 case numbers rising, will you change your daily routine?

Yes, back to quarantine

No, I feel safe

Never left quarantine

Florida Secretary of State Laurel Lee, who oversees the voting system, said the online registration system “was accessed by an unprecedented 1.1 million requests per hour” during the last few hours of Monday.

"At this time, we have not identified any evidence of interference or malicious activity impacting the site," Lee said in a statement Tuesday evening. "We will continue to monitor the situation and provide any additional information as it develops."

Lee had tweeted on Monday that some users experienced delays for about 15 minutes while trying to register due to high volume, but that they had increased capacity.

A civil rights group is threatening to sue if the governor does not extend the deadline. The Lawyers' Committee for Civil Rights Under Law said the breakdown would unjustly deprive thousands of casting ballots for president and other offices.

“We are not going to stand by idly,” said Kristen Clarke, the group's president. She said the group sued Virginia in 2016 after its computer system crashed just before the deadline, winning an extension that allowed thousands of additional voters to register.

Democrats throughout the state have pushed for an extension to the deadline.

"Not planning for a voter registration surge is voter suppression. Not ensuring everyone who wants to register can do so is voter suppression. Not extending the deadline is voter suppression. @GovRonDeSantis & @FLSecofState, you must extend the deadline," tweeted Nikki Fried, Florida's Commissioner of Agriculture and consumer services and the state's highest-ranked Democrat.

Not extending the deadline is voter suppression.

@GovRonDeSantis & @FLSecofState, you must extend the deadline.

Florida voter registration site stops working hours before deadline
Those waiting until the last minute to register to vote experienced problems gaining access to the Florida's voter registration websit...
orlandosentinel.com

10:44 PM · Oct 5, 2020 from Tallahassee, FL

1.7K 921 people are Tweeting about this

"This is just latest attempt from the Republican leaders in Florida to limit democracy. The Florida Voter Registration website not working on the last day to register to vote in Florida is blatant voter suppression. Fix the website, stop the suppression, and let democracy work," Terrie Rizzo, chair of the Florida Democratic Party, said in a statement.

"The utter incompetence of Gov. Ron DeSantis in allowing the state's voter registration website to crash on the very last day to register for the upcoming November election is, sadly, completely believable," U.S. Rep. Debbie Wasserman Schultz said. "His administrative buffoonery in operating the state's unemployment system telegraphed today's executive ineptitude. However, this particular blunder intimates a continuing pattern of voter suppression that the governor has become notorious for."

Sarah Dinkins, a Florida State University student, tried to help her younger sister register Monday night. They began trying about 9 p.m. and by 10:30 p.m. had not been successful.

“I feel very frustrated,” she said. “If the voting website doesn’t work, fewer people potentially Democratic voters will be able to vote."

This is not the first major computer shutdown to affect the state government this year. For weeks in the spring, tens of thousands of Floridians who lost their jobs because of the coronavirus pandemic couldn't file for unemployment benefits because of repeated crashes by that overwhelmed computer system, delaying their payments. DeSantis replaced the director overseeing the system but blamed the problems on his predecessor, fellow Republican Rick Scott, who is now a U.S. senator.

2:20

Florida Addresses Problems With Voter Registration Site at Deadline

NBC 6's Julia Bagg has more on what officials are saying after some people claim they may have had their registration denied due to the problems.

AP and NBC 6

This article tagged under:

DECISION 2020 • FLORIDA • RON DESANTIS • LOCAL POLITICS