No. 20A71

IN THE SUPREME COURT OF THE UNITED STATES

PATSY J. WISE, *et al.*,

Applicants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, *et al.*,

Respondents,

&

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, *et al.*,

Intervenor-Respondents.

On Application for Writ of Injunction Pending Appeal from the United States Court of Appeals for the Fourth Circuit

INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION

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QUESTION PRESENTED

Is an injunction warranted where (1) its issuance would require resolution of state law questions pending in state court proceedings, where the state trial and appellate courts have interpreted state law to reject Applicants' arguments; (2) Applicants lack Article III standing; and (3) Applicants have failed to establish a clear right to relief on the merits?

PARTIES TO THE PROCEEDING

Applicants in *Wise v. Circosta*, No. 20A71, are Donald J. Trump for President, Inc.; Republican National Committee; National Republican Senatorial Committee; National Republican Congressional Committee; North Carolina Republican Party; Gregory F. Murphy, U.S. Congressman; Daniel Bishop, U.S. Congressman; Patsy J. Wise; Regis Clifford; Samuel Grayson Baum; and Camille Annette Bambini.

Applicants in *Moore v. Circosta*, No. 20A72, are 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. All Applicants in both cases were plaintiffs in the district court and appellants in the Fourth Circuit.

Respondents in both cases are 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 Executive Director of the North Carolina State Board of Elections. The North Carolina State Board of Elections is also a Respondent in *Wise*. Respondents were defendants in the district court and appellees in the Fourth Circuit.

Intervenor-Respondents in both cases are the North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz. Intervenor-Respondents

were intervenor-defendants in the district court and intervenor-appellees in the Fourth Circuit.

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, no Intervenor-Respondent has a parent company or a publicly-held company with a 10 percent or greater ownership interest in it.

RELATED PROCEEDINGS

- *N.C. All. for Retired Ams., et al. v. N.C. State Bd. of Elections, et al.*, No. 20 CVS 8881 (Wake Cnty. Super. Ct.) — Court entered Consent Judgment on Oct. 2 and issued its Findings of Fact and Conclusions of Law on Oct. 5, Court denied Applicants' motions to stay on Oct. 16;
- *N.C. All. for Retired Ams., et al. v. N.C. State Bd. of Elections, et al.*, No. P20-513 (N.C. Ct. App.) — Court entered an administrative stay of the Wake County Superior Court's order entering the Consent Judgment on Oct. 15 and then lifted the stay, denying Applicants' Petitions for Writ of Supersedeas and Motions for Temporary Stay on Oct. 19; and
- *N.C. All. for Retired Ams., et al. v. N.C. State Bd. of Elections, et al.*, No. 40P20, (N.C. Sup. Ct.) — Court allowed the Republican Committees' motion for immediate action on their request for a temporary stay on Oct. 23 and that same day denied Applicants' motions for a temporary stay.

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INTRODUCTION[1]

Two North Carolina state courts (trial and appellate), a federal district court, and the Fourth Circuit, sitting en banc, have soundly rejected Applicants' requests to enjoin a state court Consent Judgment issued on state law grounds, and for good reason. Before entering the Consent Judgment, the Wake County Superior Court (the "State Court") conducted a lengthy hearing during which it considered (and rejected) the same arguments Applicants advance here. Importantly, the State Court found that: (1) Intervenor-Respondents (the "Alliance"), who were plaintiffs in the state court action, were likely to succeed on the merits of their claims; (2) the State Board of Elections ("NCSBE") had the statutory authority—as delegated by the North Carolina General Assembly—under North Carolina law to enter into the Consent Judgment and implement the corresponding relief, including the extension of the absentee ballot receipt deadline challenged here; (3) the terms of the Consent Judgment are fair, adequate, and reasonable; (4) the Consent Judgment is consistent with the state and federal constitutions; and (5) the resolution of that lawsuit serves "a strong public interest in having certainty in [the State's] elections procedures and rules." App. 188-98.

Applicants have pursued multiple avenues to challenge this ruling, all of which have failed thus far. The North Carolina Court of Appeals refused to stay enforcement of the Consent Judgment, denying Applicants' emergency petitions for writs of supersedeas, and the case is now pending before the North Carolina Supreme Court,

[1] Intervenor-Respondents have filed identical responses in opposition to the applications for writs of injunction in both Nos. 20A71 and 20A72 and incorporate arguments against all Applicants herein.

which should have the final word on the validity of the Consent Judgment. Determined not to leave their state law questions in the hands of North Carolina courts, Applicants simultaneously sought refuge in federal district court and then in the Fourth Circuit, demanding in each instance that federal courts disregard bedrock principles of federalism and comity, not to mention Article III's jurisdictional requirements, and enjoin the state court judgment. But despite obtaining a limited, temporary restraining order that expired on October 16, Applicants' subsequent attempts to extend that injunction have failed, both because their requested relief would upend the electoral procedures currently in place, creating a significant risk of confusion, App. 52, and because their claims suffer from numerous jurisdictional and legal defects, App. 5.

Given the procedural posture of this case, and Applicants' undisguised attempts to collaterally attack a state court ruling on state law grounds, this Court's well-trod decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), requires abstention, as unsettled questions of state law could moot or present the constitutional claims here in a significantly different procedural posture. But abstention is hardly the only reason this Court need not address the merits of Applicants' contentions. More fundamentally, Applicants lack Article III standing for each claim they seek to advance. Their claims under the Elections and Electors Clauses assert institutional injuries allegedly suffered not by Applicants, but by the General Assembly, which is not before the Court and has not authorized any Applicant to advance its interests in this action. And their equal protection claims,

asserted by individuals who have already voted successfully, do not seek to vindicate any personal injury or disadvantage, but instead attempt to prevent others from voting under a less burdensome regime—a theory which the en banc Fourth Circuit found to be "beyond [their] understanding"—while advancing wholly speculative theories of vote dilution that have been soundly rejected by courts across the country.

Election day is just over a week away, yet Applicants seek to alter, not maintain, the status quo. The procedures they wish to enjoin are currently in force. Voters are requesting and preparing to mail their absentee ballots with the expectation that those ballots will be accepted and counted if they are mailed by election day and delivered to election officials by November 12. An injunction pending appeal at this stage would risk the very confusion and potential disenfranchisement that this Court has cautioned against by imposing a new deadline on the receipt of absentee ballots that is six days earlier than advertised—all of this, once again, in the final week before election day. This Court's repeated warnings to avoid the voter confusion that inevitably comes with federal court injunctions issued close to elections compel the denial of Applicants' extraordinary request for an eleventh-hour revision of election procedures, particularly when two federal courts, citing the same risk of confusion, have already refused to grant Applicants' requested injunction.

Reasons abound to deny Applicants' extraordinary request before even reaching the merits of their claims, which advance anomalous interpretations of longstanding and long-settled constitutional dictates. Their implausible reading of the Elections and Electors Clauses invites federal courts to micromanage state

election procedures and contradicts many decades of settled precedent. And their unbounded theory of disparate treatment seeks to create a constitutional injury whenever election laws change. Simply put, neither the law, the facts, nor the public interest support Applicants' injunction, which began as and still remains an improper and disruptive collateral attack on a state court judgment that threatens North Carolina's sovereignty to interpret and enforce its own laws. Applicants have thus fallen far short of the high burden required for the extraordinary relief they seek from this Court.

JURISDICTION

This Court lacks jurisdiction because no Applicant has Article III standing to maintain the claims raised in this litigation.

DECISIONS BELOW

The Fourth Circuit's denial of an injunction pending appeal is reported at *Wise v. Circosta*, No. 20-2104, 20-2107, 2020 WL 6156302 (4th Cir. Oct. 20, 2020), and available at App. 1-49. The district court's order denying a preliminary injunction is reported at *Moore v. Circosta*, No. 20-cv-911, 2020 WL 6063332 (M.D.N.C. Oct. 14, 2020), and available at App. 50-140.[2] The North Carolina Supreme Court's order allowing the Republican Committees' motion for immediate action on the request for a temporary stay is available at App. 141-42, and its orders denying Applicants' motions for a temporary stay are available at App. 143-46. The North Carolina Court of Appeals' order denying the petitions for writs of supersedeas and dissolving the

[2] The district court issued the same decision in *Wise v. Circosta*, No. 20-cv-912 (M.D.N.C. Oct. 14, 2020).

temporary stay is available at App. 147-48. The North Carolina Superior Court's order entering the Consent Judgment is available at App. 149-87, along with its findings of fact and conclusions of law, available at App. 188-98.

STATEMENT OF THE CASE

I. Election Administration Amidst the COVID-19 Pandemic

The COVID-19 pandemic has wreaked havoc throughout the country, causing significant casualties and unforeseen disruptions to many aspects of day-to-day life. Known domestic infections have surpassed 8.5 million with more than 223,000 fatalities. As of today, North Carolina has over 255,000 confirmed cases and over 4,000 reported deaths from the virus, with new cases increasing rapidly.[3] Beyond posing a direct threat to individual and public health, the pandemic has upended the electoral process. Earlier this year, NCSBE sent letters to Governor Cooper, House Speaker Tim Moore, Senate President Pro Tempore Phil Berger, and several legislative committees, explaining many of the challenges of conducting an election during the pandemic and urging changes to North Carolina's voting laws and practices. App. 199-210. Though the General Assembly adopted some of the actions requested by NCSBE by passing HB 1169, it fell short of taking the necessary steps to protect the constitutional rights to vote and to free elections, which are strongly protected under North Carolina's constitution. N.C. Const. art. I, §§ 10, 12, 14, 19. In Governor Cooper's words, "much more work [wa]s needed to ensure everyone's right

[3] *Covid in the U.S.: Latest Map and Case Count*, N.Y. Times (updated Oct. 24, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html; *North Carolina Covid Map and Case Count*, N.Y. Times (updated Oct. 24, 2020). https://www.nytimes.com/interactive/2020/us/north-carolina-coronavirus-cases.html.

to vote is protected." App. 211-12. In the course of passing HB 1169 in mid-June, the General Assembly did not consider whether an extension of North Carolina's ballot receipt deadline—which requires rejection of any ballot received after 5:00 p.m. three days after election day, even if it is postmarked by election day—was necessary to ensure North Carolinians' ballots would be counted. *See* N.C. Gen. Stat. § 163-231(b)(1)-(2).

Later this summer, unprecedented COVID-19-related mail delays surfaced in North Carolina and across the country, creating disruptions which USPS itself has warned threaten to disenfranchise voters through no fault of their own. Notably, the General Counsel of USPS sent a letter to North Carolina's Secretary of State on July 30, 2020 (which was received in mid-August) 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." App. 213-14. Specifically, "there is a risk that . . . a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state's receipt deadline of November 6." App. 214. North Carolina itself sued USPS. App. 264-331.

With election day now just over a week away, we have already reached the window in which USPS warned it would be too late to mail ballots to meet the original

receipt deadline, and North Carolina voters stand to be disenfranchised as a result of this collateral attack on a state court judgment.

II. The Underlying State Court Proceedings

In recognition of the unprecedented challenges facing North Carolina voters under these circumstances, the Alliance filed suit against NCSBE and its chair on August 10 and amended its complaint on August 18, *see* App. 216-57. The Alliance's lawsuit brought state constitutional challenges to various state laws that impose significant burdens on North Carolinians' access to the franchise in the November election in light of the COVID-19 pandemic, including, as relevant here, the requirement that an absentee ballot must be postmarked by election day and received no later than three days after election day to be counted, N.C. Gen. Stat. § 163-231(b)(2). Contrary to Applicants' statements, North Carolina's receipt deadline had not been adjudicated in any unrelated state or federal court proceeding. Wise Appl. at 2.

Many Applicants here—the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, Donald J. Trump for President, Inc., the North Carolina Republican Party (collectively, the "Republican Committee Intervenors"), Speaker of the North Carolina House of Representatives Timothy Moore, and President Pro Tempore of the North Carolina Senate Philip Berger (collectively, the "Legislator Intervenors")—were granted intervention in this state court action. On August 18, the Alliance moved for a preliminary injunction. *See* App. 258-63. The Alliance submitted

extensive supporting evidence, including four expert reports, 17 voter and other witness affidavits, and numerous official documents. *See* App. 332-89.[4]

Before the preliminary injunction hearing, the Alliance and NCSBE—pursuant to NCSBE's authority to resolve disputes under N.C. Gen. Stat. § 163-22.2, and its emergency powers under N.C. Gen. Stat. § 163-27.1—reached a settlement and filed a joint motion for entry of a consent judgment. *See* App. 390-468. Under the Consent Judgment, which required the implementation of three Numbered Memos, 2020-19, 2020-22, and 2020-23, NCSBE agreed to: (1) count eligible ballots postmarked by election day, if received within nine days after election day (the same deadline as for military and overseas voters' ballots); (2) implement a cure process for minor ballot deficiencies, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate manned ballot drop-off stations at early voting locations and county board offices for in-person ballot return; and (4) inform the public of these changes. App. 408-10. All parties to the Consent Judgment further agreed to bear their own fees, expenses, and costs. App. 410. The State Court scheduled a hearing for October 2 to consider the proposed Consent Judgment and Intervenors' objections.

III. Federal Collateral Attacks on State Court Proceedings and Entry of the Consent Judgment

Rather than wait for the State Court to consider the proposed Consent Judgment, the Legislator and Republican Committee Intervenors, joined by several

[4] The Alliance can make available the exhibits to its Memorandum in Support of Motion for Preliminary Injunction at the Court's request.

individual plaintiffs, preemptively filed two federal lawsuits along with Motions for Temporary Restraining Orders to enjoin enforcement of the Consent Judgment before it was even entered. App. 469-588. On October 2, the State Court held a six-hour hearing, considered the *same* legal arguments raised by Applicants here, and entered the Consent Judgment implementing the Numbered Memos. *See* App. 169; 188-98. The State Court found that (1) NCSBE had legal authority to settle the case, App. 194-96; (2) the Alliance was likely to succeed on the merits, App. 193; (3) the terms of the Consent Judgment are "fair, adequate, and reasonable" and not illegal or collusive, App. 193; (4) the settlement is consistent with the state and federal constitutions, App. 196, and (5) the settlement serves "a strong public interest in having certainty in our elections procedures and rules," App. 194. The very next morning, a federal district court in the Eastern District of North Carolina granted Applicants' requested TROs to block entry of the Consent Judgment and transferred the case to the Middle District of North Carolina, where Applicants requested conversion of the TROs into preliminary injunctions. *See* App. 589-608.[5] Meanwhile, on October 5, the State Court issued its Findings of Fact and Conclusions of Law, emphasizing that the Consent Judgment *does not* enjoin any statutes but rather "retains fidelity to the purpose behind [certain state] statutes" and "makes only minor and temporary changes to election procedures to accommodate the exigencies of the COVID-19 pandemic." App. 192-93. Applicants immediately filed writs of supersedeas and motions for temporary stay in the state appellate court. App. 609-736.

[5] The Eastern District of North Carolina issued the same order in both the *Wise* and *Moore* cases. The Middle District of North Carolina granted the Alliance's motions for intervention. App. 737-42.

IV. District Court's Denial of a Preliminary Injunction

On October 14, the Middle District of North Carolina denied Applicants' motions for preliminary injunction. *See* App. 50-140. The court determined that all Applicants lacked standing for their vote dilution, Elections Clause, and Electors Clause claims. *See* App. 91-92, 120-24. The court further held that only individual voters who had already cast ballots had standing to raise disparate treatment claims, and found that those Applicants had failed to establish a likelihood of success regarding their challenges to the postmark definition and ballot drop-off stations, including the entirety of Numbered Memo 2020-23. *See* App. 94, 110-11, 113. The court found "the guidance contained in Numbered Memo 2020-23 was already in effect at the start of this election as a result of [NCSBE's] administrative rules," and thus, even under its flawed equal protection analysis, Applicants failed to demonstrate a likelihood of success on the merits of their challenge to that Numbered Memo. App. 111. Likewise, because North Carolina's law does not define "postmark," NCSBE's definition of "postmark" under Numbered Memo 2020-22 also presented no issue. App. 113. Though the court erroneously found those few Voter Applicants were likely to succeed on their equal protection challenges to cure procedures for missing witness or assistant signatures and the ballot receipt deadline extension, *see* App. 101, the witness cure challenges were mooted by an order issued in *Democracy North Carolina v. North Carolina State Board of Elections*, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020), and the court declined to enjoin the receipt deadline extension, relying on this Court's ruling in *Purcell v. Gonzalez*, 549 U.S. 1

(2006). *See* App. 117-18. On October 16, the district court denied Applicants' motion for a stay pending appeal, or alternatively to leave the TRO in effect pending appeal. *See* App. 743-45.

V. Ongoing State Court Proceedings

During the same period, on October 15, the state appellate court granted a temporary stay, pending a ruling on Applicants' petitions for writs of supersedeas. App. 790-91. Four days later, the state appellate court denied Applicants' petitions. App. 147-48. Accordingly, NCSBE promptly issued Numbered Memos 2020-22 and 2020-23, which were no longer subject to a TRO in federal court or a stay in state court. As a result, countless North Carolinians have relied on the extended ballot receipt deadline, made the choice to vote by mail as a result of the extension, and determined when to mail their ballots based on the new deadline. And, per *all* parties'—*including Applicants'*—mutual agreement and understanding and after giving notice to the state appellate court, NCSBE proceeded with a further revised version of Numbered Memo 2020-19, which implemented a cure process that did not treat the absence of a witness or assistance signature as a curable defect. As a result, that Numbered Memo is no longer at issue here.

On October 21, Applicants petitioned the North Carolina Supreme Court for writs of supersedeas and moved for temporary stays pending review of those petitions. App. 825-950. Just yesterday, the North Carolina Supreme Court denied the motions for temporary stay. App. 143-46. Applicants' petitions for writs of supersedeas are still pending.

VI. Fourth Circuit En Banc (12-3) Decision

In the meantime, on October 15 and 16, Applicants noticed appeals to the Fourth Circuit and filed emergency motions for an injunction pending appeal. App. 746-89, 792-821. On appeal, Applicants did not challenge Numbered Memo 2020-23 (establishing separate absentee ballot drop-off stations) and challenged the further revised Numbered Memo 2020-19 only to the extent it incorporates the extended receipt deadline at issue in Numbered Memo 2020-22. Thus, the only issue before the Fourth Circuit was "whether to grant an injunction—which a district court ha[d] already denied—of the ballot-receipt extension"; accordingly, the ballot receipt deadline is the only issue properly before this Court. App. 7.

The Fourth Circuit consolidated Applicants' appeals and granted hearing en banc on October 19. App. 822-24. The following day, in a 12-3 decision, the Fourth Circuit denied Applicants' stay motions. Writing for the majority, Judge Wynn, emphasized that "*Purcell* strongly counsels *against* issuing an injunction here" because "the ballot-receipt extension has been the status quo ever since the [state] trial court approved the settlement (October 2)." App. 8-9 (citing *Andino v. Middleton*, No. 20A55, -- S. Ct. --, 2020 WL 5887393, at *1 (Oct. 5, 2020)). Judge Wynn noted—contrary to the dissent's unwarranted hyperboles—that the implementation of a mere six-day administrative extension of the receipt deadline does not suggest "the sky is falling." App. 4. And despite the dissent's incorrect statement that "the witness-requirement issue is also before [it,]" App. 8, the only issue Applicants raised was the receipt deadline. In an effort to apply their own policy judgments to the facts before

them, the dissent "attempt[ed] to stretch *Purcell* beyond its clear limits to cover not just federal court action, but also action by state courts *and* state executive agencies acting pursuant to a legislative delegation of authority." App. 10. Joining three other state and federal courts in rejecting Applicants' claims, the Fourth Circuit held that in addition to *Purcell* and *Andino* admonishing federal courts *not* to intervene at this late stage, Applicants lacked standing to bring their Elections and Electors Clause challenges, *Pullman* abstention was appropriate, and notwithstanding these facts, Applicants were unlikely to succeed on the merits of any of their claims. App. 17-18.

Now, a mere ten days before election day, at a crucial time when North Carolina voters have relied on NCSBE's guidance regarding the receipt deadline to inform when they request and mail their absentee ballots (and where North Carolina is already within the window in which USPS warned ballots mailed may not be received in time to meet the unmodified receipt deadline), Applicants ask this Court to upend the status quo and risk the disenfranchisement of North Carolina voters in the process. Meanwhile, Applicants have continued to pursue parallel state court appeals and await a ruling from the North Carolina Supreme Court.

ARGUMENT

Applicants bear a heavy burden to demonstrate that the extraordinary remedy of a writ of injunction is warranted. "The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction." *Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, J., in chambers). The Court has "consistently stated, and [its] own Rules so require, that such power is to be used

sparingly." *Id.; see* S. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). Issuance of such an "injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

To meet this heavy burden, first, "an applicant must demonstrate that 'the legal rights at issue are indisputably clear.'" *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers) (quoting *Turner Broad. Sys., Inc.*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers)). Second, "[a]n injunction is appropriate only if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)).

I. The Application for injunction pending appeal seeks unprecedented intrusion into ongoing state court proceedings, and this Court should abstain.

Before addressing the merits of Applicants' request for extraordinary relief in the form of an injunction pending appeal, and the numerous reasons why they have failed to demonstrate a clear right to this remedy, the Court should take stock of the procedural posture of this litigation and the fundamental principles of federalism and comity that Applicants attempt to cast aside. What began as an undisguised, fully transparent attempt to bypass potential unfavorable rulings in ongoing state court

proceedings has escalated to competing, parallel legal proceedings in the federal and state courts of last resort, where many of the same Applicants have simultaneously raised identical state law questions for each court's review. "Few cases implicate the 'dual aims' of the *Pullman* abstention doctrine—avoiding advisory constitutional decisionmaking and promoting the principles of comity and federalism—more strongly than this one." App. 16 (quotation marks omitted). Because "state courts are the ultimate expositors of state law," North Carolina courts should have the last word. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

For these reasons, the overwhelming majority of the Fourth Circuit, sitting en banc, correctly determined that the doctrine established in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), warrants abstention in this case. *See* App. 14-17. This Court has announced that under *Pullman*, "[a]bstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)). Though not required for *Pullman* abstention, "[w]here there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, [the Court] ha[s] regularly ordered abstention." *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975).

If the procedural posture of this case does not demand *Pullman* abstention, then it is unclear what does. Applicants have now asked no fewer than three federal

courts to decide questions of state law, namely whether the state legislature has properly delegated to NCSBE the authority to enter the Consent Judgment and promulgate the accompanying Numbered Memos, while simultaneously litigating the same issues in state court, including, currently, the North Carolina Supreme Court.[6] App. 825-950. The State Court has already considered and rejected Applicants' narrow interpretation of NCSBE's authority in entering the Consent Judgment, and the state appellate court refused to stay that judgment when presented with the same arguments, *see* App. 188-98, 147-48. A federal district court reached the opposite conclusion, to be sure, *see* App. 79, but that conflicting decision simply suggests that the state law questions presented in this case are unsettled, which counsels in favor of abstention; state courts, being "the ultimate expositors of state law" should thus have the final word. *Mullaney*, 421 U.S. at 691.

There is no question, as the Fourth Circuit acknowledged, "that the resolution of this state law question is 'potentially dispositive.'" App. 15. If the North Carolina Supreme Court agrees with the lower state courts that NCSBE acted within its authority, "there is plainly no Elections Clause problem." App. 15; *see* App. 42 (dissent agreeing "confident[ly] that [NCSBE] could legally extend voting" in numerous situations). Further, even if Applicants' equal-protection claims were colorable—they are not, *see infra* Section III—NCSBE's authority to promulgate the challenged

[6] Additionally, the Fourth Circuit also highlighted that "[w]hether ballots are *illegally* counted if they are received more than three days after Election Day"—which is a necessary determination for Applicants' otherwise unfounded equal-protection theory—"depends on an issue of state law from which [federal courts] must abstain." App. 13.

Numbered Memos negates the foundation of Applicants' disparate-treatment and vote-dilution theories: extending the receipt deadline would not contravene state law and could not result in any illegal ballots.[7] *See* App. 16-17; *see also* Wise Appl. at 19-20 (stating that whether ballots cast under Memos are "lawful" is "precisely what is in dispute" in Applicants' equal-protection challenges); Moore Appl. at 22, 24 ("[The deadline extension] subjects Heath and Whitley to 'arbitrary and disparate treatment' by 'contraven[ing] the fixed rules or procedures' . . . .").

This Court's other abstention decisions, while not expressly invoked by the Fourth Circuit, nonetheless underscore the principles of federalism and comity at stake here. In *Pennzoil Co. v. Texaco, Inc.*, for instance, the Court held that abstention is required when the losing party in a state court proceeding turns to federal court seeking to enjoin enforcement of the state court judgment, even if they allege federal constitutional violations. 481 U.S. 1, 13 (1987). The Court—citing "the importance to the States of enforcing the orders and judgments of their courts"—held that the federal court should "defer[] on principles of comity to the pending state proceedings," *Id.* at 13-14, 17, rather than render the state court's adjudication nugatory. And in *Growe v. Emison*, 507 U.S. 25 (1993), when a federal district court pre-empted

[7] Given that "a state trial court approved of the ballot-receipt extension, and a state appellate court declined to enjoin it," it is highly likely that this state law question will be resolved in Respondents' favor. App. 15 n.9. "[A]ll evidence suggests that the state courts do not believe [NCSBE] acted beyond its authority in ordering the extension." App. 15 n.9; *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940) ("A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

ongoing state court litigation and enjoined state officials from implementing a state court-ordered redistricting plan, this Court unanimously reversed, holding that the district court erred in not "stay[ing] its hand" and deferring to the state court action. *Id*. at 33, 37. Just as "Minnesota can have only one set of legislative districts," North Carolina can ill afford to have competing judgments that seek to establish absentee voting procedures with little more than a week left before election day. *Id*. at 35.

These collateral attacks on state court proceedings are precisely what federal abstention doctrines seek to avoid, particularly where Applicants have turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co.*, 481 U.S. at 14. As the Fourth Circuit noted, "[t]his fast-moving case is proceeding in state court and involves an ongoing election—two sound reasons for us to stay our hand." App. 5. And the fact that the resolution of actively pending state law questions could moot (or eliminate) Applicants' federal constitutional claims is all the more reason for this Court to abstain.

II. Applicants cannot establish any right to relief under the Electors or Elections Clauses.

Should the Court proceed to the merits of the Applications, several threshold legal defects preclude any relief on Applicants' Electors and Elections Clause claims. First, their purported injuries rest entirely on the invasion of institutional rights held by the state legislature, which is not before the Court and whose interests cannot be advanced by individuals lacking authority to act on its behalf. Second, even if the General Assembly were a party to this action, the election directives Applicants challenge are entirely within the scope of authority delegated *by the General*

Assembly to NCSBE. The Fourth Circuit thus correctly determined that Applicants failed to demonstrate a likelihood of success, much less an indisputable right to relief as is required to obtain the extraordinary injunction Applicants seek here.

1. Applicants lack standing to assert violations of the Elections and Electors Clauses.

Both the district court and the en banc Fourth Circuit agreed that none of the Applicants who seek this Court's intervention into the administration of North Carolina's elections have suffered any cognizable injury under the Elections or Electors Clauses. At its "irreducible constitutional minimum," standing requires: (1) an injury-in-fact, that is (2) fairly traceable to the defendant's conduct, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Applicants must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Moreover, prudential considerations require "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

This Court has made clear that individuals, including legislators, lack standing to vindicate purported institutional injuries suffered by the state legislature as a whole; yet that is precisely the claim that Applicants Moore and Berger—two individual legislators and presiding officers of the General Assembly—advanced in

their federal court action.[8] As the district court correctly explained: "the Supreme Court [has] found a lack of standing where '[legislative plaintiffs] have alleged no injury to themselves as individuals'; where 'the institutional injury they allege is wholly abstract and widely dispersed'; and where the plaintiffs 'have not been authorized to represent their respective [legislative chambers] in [an] action." App. 121-22 (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)).

Although Moore and Berger are leaders of their respective chambers of the General Assembly, their titles alone are insufficient to confer standing. *Cf. Raines*, 521 U.S. at 812; *Karcher v. May*, 484 U.S. 72, 81-82 (1987) (explaining that presiding legislative officers were proper parties only because state law authorized them to represent the state legislature in this type of litigation). To assert an institutional injury to the General Assembly as a whole, Moore and Berger must demonstrate that they have been authorized by the General Assembly to represent its interests in this lawsuit—a burden they cannot carry. App. 122 ("The General Assembly has not directly authorized Plaintiffs to represent its interests in this specific case."); *cf. Ariz.*

[8] There is no question that Republican Committee Applicants and Voter Applicants lack standing to bring an Elections or Electors Clause claim, and Applicants provide no serious argument to assert otherwise. *See* Moore Appl. at 28-29 (arguing only that one voter plaintiff has standing to pursue and equal protection claim). Indeed, this Court has squarely held that private citizens do not have standing to bring an Elections Clause challenge of the type that Applicants press here. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This edict also bars Applicants' Electors Clause claim because the two clauses play functionally identical roles. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"); *see also, e.g., Castañon v. United States*, 444 F. Supp. 3d 118, 140-41 (D.D.C. 2020); *De La Fuente v. Simon*, 940 N.W.2d 477, 493 n.15 (Minn. 2020). This is because "[t]he only injury [private citizen] plaintiffs allege is that . . . the Elections Clause . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *See Lance*, 549 U.S. at 441-42; Moore Appl. at 13-18.

State Legislature at 802 (holding state legislature could pursue Elections Clause challenge because it was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers") (quotation marks omitted).

To the extent Moore and Berger attempt to rely on N.C. Gen. Stat. § 120-32.6 ("Certain Employment Authority") and § 1-72.2 ("Standing of Legislative Officers"), "[n]either statute" "authorizes them to represent the General Assembly as a whole when acting as plaintiffs in a case such as this one." App. 123. These provisions state only that, in judicial proceedings challenging the validity or constitutionality of a North Carolina statute or constitutional provision, the Speaker of the House and the President Pro Tempore of the Senate jointly represent the General Assembly for the purpose of defending such challenged provisions. *See* N.C. Gen. Stat. §§ 120-32.6; 1-72.2. That is not the procedural posture through which this case appears. Moore and Berger are not defending an action challenging the validity or constitutionality of an act of the General Assembly, rather, they *initiated* this federal court action to challenge NCSBE's Numbered Memos and the Consent Judgment. App. 14.

Berger and Moore thus appear as individuals who lack authority to stand in the General Assembly's shoes. And because of their misplaced reliance on the state legislature's institutional rights, they failed to identify any particularized, concrete, or cognizable injury that they personally have suffered or will suffer as a result of the Numbered Memos. Instead, the only injury they allege is an institutional one shared by the entire General Assembly: that NCSBE has purportedly impermissibly stepped

into the legislative space, usurping the General Assembly's power in the process. Moore Appl. at 16-21. *But see Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) ("[I]ndividual members lack standing to assert the institutional interests of a legislature.") (citing *Raines*, 521 U.S. at 829); *Corman v. Torres*, 287 F. Supp. 3d 558, 571-73 (M.D. Pa. 2018) ("United States Supreme Court precedent is clear—a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.").[9]

Even if Applicants could establish individual injuries, their Elections and Electors Clause claims necessarily "rest . . . on the legal rights or interests of third parties,'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499), and they have identified no "'hindrance' to the [General Assembly's] ability to protect [its] own interests," *id.* at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). "Absent a 'hindrance' to the third-party's ability to defend its own rights, this prudential limitation on standing cannot be excused." *Corman*, 287 F. Supp. 3d at 572 (quoting *Kowalski*, 543 U.S. at 130). Thus, applying the "usual rule" of prudential standing, *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 392 (1988), Applicants cannot assert claims on the General Assembly's behalf, and are certainly not entitled to the extraordinary remedy of an injunction pending appeal on those grounds. *Hughes v.*

[9] The opinion of the three-judge panel in *Corman* is highly instructive. There, as here, individual legislators brought in federal court a collateral attack on a state court judgment. *See id.* at 561. The panel ultimately concluded that these parties lacked both Article III and prudential standing to bring their claims in federal court. *See id.* at 573-74.

City of Cedar Rapids, 840 F.3d 987, 992 (8th Cir. 2016); *see also Corman*, 287 F. Supp. 3d at 571-73.

2. Applicants' Elections Clause and Electors Clause claims fail on the merits.

While Applicants seek to re-define the scope of the Elections and Electors Clauses, the issue before this Court is far more straightforward. There is no legitimate question—as even the three dissenting Fourth Circuit judges upon whom both sets of Applicants rely recognized—that "[NCSBE], or other state election boards, [have authority] to make minor *ad hoc* changes to election rules in response to sudden emergencies." App. 41. Indeed, the dissenting judges rightly recognized the "long history, both in North Carolina and in other states, of this power being exercised" to facilitate "the smooth functioning of elections," App. 41-42, and expressed confidence that NCSBE could use such power to change the "time" of voting during emergencies in direct contravention of a state statute. App. 42 ("For example, if an electrical power outage halts voting in a precinct, we are confident that [NCSBE] could legally extend voting in that precinct.").

This Court's decisions confirm this understanding. The Elections and Electors Clauses vest authority in "the Legislature" of each state to regulate congressional and presidential elections. U.S. Const. art. I, § 4, cl.1, art. II, § 1, cl. 2. This Court has held, however, that state legislatures can delegate this authority. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the State has prescribed for

legislative enactments" (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *Corman*, 287 F.Supp.3d at 573 ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state." (quoting *Ariz. State Legislature*, 576 U.S. at 816)).

Thus, the question Applicants ask this Court to consider is simply one of state law: whether NCSBE exceeded the statutory authority delegated by the General Assembly. As this Court has repeatedly recognized, such questions are wholly within the province of state courts. *Mullaney*, 421 U.S. at 691 ("This Court [] repeatedly has held that state courts are the ultimate expositors of state law.") (citations omitted)). In fact, one state court has already found that NCSBE was indeed authorized to issue the Numbered Memos, and the state appellate court has refused to stay that trial court's ruling.[10] Indeed, while pursuing this appeal, Applicants have simultaneously filed petitions for writs of supersedeas and motions for a stay in the North Carolina Supreme Court. App. 825-950.

The Fourth Circuit also determined correctly that the Consent Judgment and its accompanying Numbered Memos are consistent with the General Assembly's delegation of authority to NCSBE. That is because North Carolina law confers upon NCSBE broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, NCSBE is empowered to "compel observance" of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c). NCSBE's Executive Director, as the chief state elections official, has the

[10] Additionally, the North Carolina Supreme Court denied Applicants' requests for temporary stays, and their petitions for writs of supersedeas are still pending. App. 143-46.

authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 N.C. Admin. Code 01.0106 ("Emergency Powers of Executive Director"), 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. The State's election laws specifically contemplate instances in which the Executive Director's orders may not align with previously enacted laws during emergencies, and advise that the Executive Director "avoid," but do not prohibit, such conflict. N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid *unnecessary* conflict with the provisions of this Chapter.") (emphasis added). Furthermore, the State Court's entry of the Consent Judgment invalidated the pre-existing ballot receipt deadline, and thus NCSBE "shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable," and, "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*. § 163-22.2.

These provisions authorize NCSBE's Numbered Memos under firmly established tenets of North Carolina statutory construction, which provides the applicable standards for analyzing statutory delegations to NCSBE—and not the principles of federal administrative law upon which Applicants rely, *see* Wise Appl. at 15-17. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 515 (1989) (applying state canons of statutory interpretation when interpreting state law); *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 482 (4th Cir. 2007)

("[W]e are . . . obliged to interpret the [state] Act by applying the principles of statutory construction that would guide a[] [state] court in making such a decision."); *see generally Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[T]he law to be applied in any case is the law of the state."). First, remedial statutes, such as N.C. Gen. Stat. § 163-27.1, must be construed liberally in the light of the evils sought to be eliminated, the remedies intended to be applied, and the legislative objective, *Burgess v. Joseph Schlitz Brewing Co.*, 259 S.E.2d 248 (N.C. 1979); *Puckett v. Sellars*, 69 S.E.2d 497 (N.C. 1952). The evil in this scenario is the disruption to the normal election schedule caused by COVID-19 and USPS delays, which supports the extension of the ballot receipt deadline to prevent the arbitrary disenfranchisement of voters who timely submit their ballots. Further, under North Carolina law, the interpretation of an enabling statute given by the regulatory agency involved—here, NCSBE—should be accorded considerable weight. *See High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319 (2012) (noting that North Carolina courts "give great weight to an agency's interpretation" when evaluating the "limits of statutory grants of authority to an administrative agency"); *see, e.g.*, *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 659 S.E.2d 456, 471, *aff'd.*, 362 N.C. 504 (2008) ("We hold that the Agency's interpretation of its enabling statutes is reasonable and due some deference.").

Applicants' general disregard for these state court judgments and legal standards is revealed yet again when they suggest that state courts should *not* be afforded deference in interpreting state law questions in light of the concurrence in

Bush v. Gore, 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring). Putting aside that the majority did not adopt this reasoning, *Bush* was expressly "limited to the . . . circumstances" before the Court and has not been cited by a majority opinion of the Court since. *Id.* at 109. Even assuming Applicants are correct that a "significant departure" from statutory election laws "presents a federal constitutional question" (they are not), that is not the case before this Court. Moore Appl. at 27 (citing *Bush*, 531 U.S. at 113). North Carolina law already instructed voters to postmark their ballots by election day and allowed them to be received by election officials up to three days after election day; the modified receipt deadline simply extends that deadline for the delivery of ballots to coincide with the deadline applicable to military and overseas ballots and to account for well-documented USPS delivery delays. It is, in effect, a minor change in the timeline for receiving ballots that requires nothing different of the voters themselves who are still required to mail their ballots by election day. And contrary to the Wise Applicants' suggestion, North Carolina law imposes criminal penalties on unauthorized individuals who attempt to deliver ballots belonging to others, but does not automatically render those ballots invalid. *See* N.C. Gen. Stat. § 163-237(d) (criminalizing fraud in connection with absentee ballots). In this regard, there has been no change in the law.

Finally, to the extent state regulations in the context of federal elections "implicate a uniquely national interest," Wise Appl. at 17 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)), based on "federal constitutional power," the U.S. Constitution is clear about which branch of federal government has "the power

to alter those regulations or supplant them altogether," *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013). It is not the federal judiciary, nor even this Court, but Congress. The Elections Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as *Congress* declines to pre-empt state legislative choices." *Id.* (emphasis added) (quoting *Foster v. Love,* 522 U.S. 67, 69 (1997)). Therefore, it is the role of Congress, not this Court, to restrain North Carolina's election regulations under the Elections Clause. *See id.*

III. Applicants are not entitled to relief on their Equal Protection Clause claims.

Voter Applicants' Equal Protection claims were "beyond [the Fourth Circuit's] understanding" because they rely on non-existent theories of constitutional harm and distort equal protection jurisprudence beyond recognition. As the Fourth Circuit recognized, Voter Applicants have cast their ballots successfully; none allege any personal disadvantage caused by the Numbered Memos. They merely complain that others may have an easier time voting—which is not only factually incorrect but assumes a previously unrecognized constitutional right to dictate how others vote—and make unsupported assumptions about vote dilution and fraud that even the district court refused to accept. Their Equal Protection Clause claims plainly fail on the merits and do not support an injunction pending appeal.

1. Applicants have not suffered a cognizable injury.

As cognized in their pleadings, Voter Applicants are injured because they have already voted under a more rigorous regime and voters following them will be able to vote with fewer restrictions. Though false, that is not an injury sufficient to

demonstrate an entitlement to prospective injunctive relief. Surely, Voter Applicants do not intend to vote again in the November election, and any injunction issued against the Numbered Memos would impose restrictions on other voters but confers no additional benefit (nor alleviates any injury) to Applicants in this case. This Court's decision in *City of L.A. v. Lyons*, 461 U.S. 95 (1983) is instructive. There, the plaintiff sued for injunctive relief seeking a ban on the Los Angeles Police using chokeholds because he had been previously subject to a chokehold. *Id.* at 99-100. This Court denied his relief because it was speculative that the plaintiff himself would be subject to a chokehold in the future, and although he could show he had once been subject to unconstitutional conduct, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

So too here. Even if Voter Applicants suffered a cognizable injury under the Equal Protection Clause by casting their ballots under a more restrictive regime, they cannot plausibly allege any continuing or future injury that an injunction could cure because they have already voted, successfully. Federal courts have great powers, but they do not possess time machines. *See, e.g.*, *Herron for Cong. v. Fed. Election Comm'n*, 903 F. Supp. 2d 9, 13 (D.D.C. 2012) ("[T]his court has no power to alter the past."). In the election context, previously-suffered voting injuries do not provide standing for prospective injunctive relief absent some reasonable contention that they will occur again. *See, e.g.*, *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d

977, 982 (6th Cir. 2020); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 811 (8th Cir. 2007). Applicants have alleged no future prospect of disparate treatment, and Courts nationwide, including both the district court and the Fourth Circuit in this case, have found the only potential future harm plaintiffs have alleged—vote dilution—too speculative to establish standing. This alone should result in the denial of Applicants' request.

Applicants also fail to allege a theory of vote dilution that is concrete or particularized to them, as opposed to a generalized, speculative grievance that can be raised by any voter in North Carolina. Their claims rely entirely on the unsupported assumption that the power of their votes will be diluted by the casting of unlawful ballots as a result of the Consent Judgment, but it is hardly clear that this is even a correct use of the phrase "vote dilution" or can be the basis for any cognizable injury whatsoever. *See Duncan v. Coffee Cnty.*, 69 F.3d 88, 94 (6th Cir. 1995) ("[V]ote dilution is a term of art. Merely expanding the voter rolls is, standing alone, insufficient to make out a claim of vote dilution.").

In any event, courts have consistently rejected this theory as a basis for standing because it is unduly speculative and impermissibly generalized. *See, e.g.*, *Carson v. Simon*, No. 20-cv-2030, at *8 (D. Minn. Oct. 11, 2020) (holding "allegations of vote dilution due to the counting of hypothetical, allegedly unlawful ballots is a generalized grievance that does not confer standing"); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *35 (W.D. Pa. Oct. 10, 2020) ("[A] claim of vote dilution brought in advance of an election on the theory of the risk

of potential fraud fails to establish the requisite concrete injury for purposes of Article III standing."); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other '[g]enerally available grievance[s] about the government,' plaintiffs seek relief on behalf of their member voters that 'no more directly and tangibly benefits [them] than it does the public at large.'" (quoting *Lujan*, 504 U.S. at 573-74)); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (distinguishing cognizable vote dilution in redistricting context and generalized dilution as a result of speculative voter fraud; "If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution" as a result of allegedly inaccurate voter rolls "[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). And it is telling that Applicants point to no authority (beyond the initial district court that granted a TRO here) which has accepted anything remotely similar to the limitless vote dilution theory advanced in Applicants' briefs.

Having failed to identify a "concrete and particularized" injury to support their Equal Protection Clause claims, the Fourth Circuit correctly denied Applicants'

request for an injunction pending appeal, and this Court should do the same. *See Spokeo*, 136 S. Ct. at 1548.

2. Applicants' equal protection claims fail on the merits because they are not subject to disparate treatment.

Compounding Applicants' lack of injury is the absence of any disparate treatment of Voter Applicants under any of the Numbered Memos that remain at issue. For instance, the receipt deadline extension ensures that all eligible ballots will be counted if they are mailed by election day and received by November 12. The deadline extension does not impose any greater or lesser requirement on voters, who are still required to submit their ballots by election day, and it applies to all mailed ballots, even those cast earlier by Voter Applicants should they arrive after November 6 (the original deadline). No ballot will be accepted or rejected based on differential standards, and Applicants fail to establish that their—or anyone else's—votes will be valued less than others. *See Bush*, 531 U.S. at 104-05.

Here again, Applicants' reliance on this Court's decision in *Bush*—once more ignoring that decision's limited applicability—is misplaced. *See supra* at Section II.2. In *Bush*, this Court found that Florida voters were subject to unlawful arbitrary treatment due to the lack of "uniform rules" on *how* to implement post-election procedures for determining the intent of the voter and identifying a legal vote, resulting in county-to-county variation and subjecting voters to arbitrary acceptance or rejection of their ballots. *Id. Bush* thus stands for the proposition that arbitrary and disparate treatment in the *valuation* of one person's vote in relation to another's can implicate the Equal Protection Clause—concerns which are wholly absent in this

case. Under the election procedures currently in place, the validity of each ballot will be assessed under the same standards and Applicants fail to present any argument demonstrating otherwise.

As the district court found, a change in election procedures, even after voting has started, does not by itself trigger an equal protection violation. App. 98-99. Even the dissenting opinion from the Fourth Circuit's en banc order expressed confidence that election officials can "legally extend voting" in a precinct that suffered a power outage, for instance, which not only contradicts Applicants' disparate treatment theory, App. 42, but also underscores the flaw in Applicants' theory that the Equal Protection Clause forecloses all changes to election procedures—including those designed to protect the right to vote—once an election is underway.

3. Applicants' theory of standing would result in a limitless expansion of the Equal Protection Clause.

While the factual premise of Applicants' equal protection claims—that they are subject to disparate treatment—is incorrect, the theory they advance is even more problematic. Their arguments suggest that any differential treatment, without any personal injury or disadvantage, creates a constitutional harm. That is a breathtaking expansion of the Equal Protection Clause. Accepting this theory would confer a constitutional injury on just about anyone every time a law changes; individuals who abided by a former law would presumably suffer an equal protection injury simply because other individuals may be subject to fewer restrictions. Taking Applicants' argument to its logical conclusion would lead to absurd results. It would mean that someone who is already registered to vote could challenge the introduction

of online voter registration in the State because that "easier" procedure was unavailable to them at the time of registration—just as North Carolina did on September 1 when it introduced its online registration portal. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169"). Yet that is precisely the argument Applicants have advanced, and which the Fourth Circuit found to be "beyond [their] understanding." App. 12; *but see Short v. Brown*, 893 F.3d 671, 677-78 (9th Cir. 2018) ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution."). The Court should similarly reject Applicants' invitation to adopt a limitless expansion of the Equal Protection Clause. *Cf.* App. 12 ("Moreover, in a sharp departure from the ordinary voting-rights lawsuit, *no one was hurt by this deadline extension*.").

IV. Granting Applicants' extraordinary requested relief will not aid the Court in its jurisdiction.

"An injunction is appropriate only if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)). Whether or not the court grants this extraordinary injunction has no bearing on the Court's jurisdiction; in either scenario, the impending election will occur, and the issues presented in this case are *just as likely* be mooted. *See Moore* Appl. at 26. Thus, Applicants cannot demonstrate that granting the injunction is necessary or appropriate to aid this Court's jurisdiction. The Court faces a choice between two options—staying its hand or exercising its exceedingly rare power to "issue an order *altering* the legal status quo," *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (emphasis in original)—

neither of which is more likely than the other to preserve the Court's jurisdiction. Under these circumstances, the Court should deny Applicants' requested relief.

Not only is this relief unnecessary to preserve the Court's jurisdiction, it is, in fact, unavailable to Applicants. This Court's Rules require Applicants to demonstrate "that adequate relief cannot be obtained in any other form or from any other court." S. Ct. R. 20.4(a). But Applicants have raised these *exact* claims before the North Carolina Supreme Court, App. 825-950, and they openly confess that—should that court deny their request for a stay—they "plan to seek appropriate relief from this Court, which could be as early as next week." Moore Appl. at 13 n.3. Thus, Applicants' admission of the availability of the state forum—which is the *proper forum* in which to pursue their claims, *see supra* Section I—is sufficient reason to deny the extraordinary relief they seek here, because "[e]ven without an injunction pending appeal, the applicants may continue their challenge to the regulations" in the state courts. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers).

Because Applicants cannot demonstrate that granting the injunction is necessary to aid the Court's jurisdiction, they rely largely on far-fetched allegations of irreparable harm. But this too is insufficient to warrant an injunction. *See id.* ("While the applicants allege they will face irreparable harm . . . , they cannot show that an injunction is necessary or appropriate to aid our jurisdiction."). Even assuming this factor *were* relevant (it is not), Applicants have not and will not suffer any injury, much less irreparable harm. And to the extent Applicants Wise, Heath,

and Whitley suffered an injury by voting under a more restrictive regime, improbable as that theory may be, they cannot plausibly allege they will endure this harm in the future, *see City of L.A.*, 461 U.S. at 111.

Finally, the equities and public interest weigh strongly against an injunction. The slight (or non-existent) harm to Applicants on the one hand must be weighed against the harm to NCSBE, the Alliance, and all North Carolina voters by entering an injunction pending appeal, which will be substantial. For instance, North Carolinians have already been notified of the receipt deadline and will take that into account in exercising their fundamental right to vote. Should the Court, at this late date, reverse NCSBE's guidance, countless North Carolinians who have relied on this guidance in deciding whether to vote by mail, and how early to mail their ballot, will be disenfranchised by a receipt deadline, revised just days before the election, which requires their ballots to be delivered to their county boards six days earlier than previously advertised. Indeed, according to USPS's warnings, it may already be too late for voters who requested absentee ballots to receive and return them by mail before the original deadline, which Applicants seek to reinstate. App. 213-15.

V. The concerns animating *Purcell* counsel in favor of denying the requested relief.

Again, with election day just over a week away, we have already reached the window in which USPS warned it would be too late to mail ballots to meet the original receipt deadline, App. 213-15, and an untold number of voters have reasonably relied on the current receipt deadline in making their plans to vote. They cannot now go back in time and send their absentee ballots to comply with the original deadline, so

any change at this point poses a substantial risk of voter confusion and disenfranchisement. Under these circumstances, this Court's ruling in *Purcell* counsels against the extraordinary relief requested relief here. First, *Purcell* is a caution to a reviewing court—deprived of the full record before a lower court—not to act hastily close to elections. In that case, the district court considered evidence presented to it and denied a request for a preliminary injunction that would have prevented Arizona from enforcing a new identification requirement. 549 U.S. at 3-4. The Ninth Circuit granted an injunction pending appeal a little over a month before the upcoming election. This Court found that the Ninth Circuit erred in granting the injunction without giving appropriate deference to the findings and deliberations of the district court—particularly given the proximity to the election and the increasing risk of voter confusion caused by conflicting court orders as election day approaches. *Id.* at 4-5.

Applicants' ongoing collateral attack on state court proceedings have effectively placed the reviewing federal courts in the same position as the Ninth Circuit in *Purcell*. Having failed to convince two state courts (trial and appellate), a federal district court, and the Fourth Circuit, sitting en banc, to grant their requested injunction, Applicants seek this Court's intervention, with just over a week remaining before election day, to enjoin election procedures that are currently in place. The consequences are significant and potentially disenfranchising for North Carolina voters, particularly those who have yet to mail their ballots to their county boards, and, under Applicants' requested injunction, would learn in the week before the

election that their mailed ballots must arrive at their county election board offices six days earlier than advertised.

While *Purcell* certainly does not prohibit the federal judiciary from interceding close to elections to defend the Constitution, it advises federal courts to tread carefully in deciding whether to do so. *Id.* at 4-6. The district court and Fourth Circuit acted entirely consistent with that admonition. And although the district court found (incorrectly) that Applicants had a likelihood of success on their equal protection claim, it decided that given the timing and the impending election, it would be inappropriate to enjoin NCSBE from implementing the Consent Judgment and the accompanying Numbered Memos. The Fourth Circuit likewise determined that *Purcell* was one of many reasons why an injunction is inappropriate here.

This Court's recent cases invoking *Purcell* demonstrate why the district court and the Fourth Circuit's application of this doctrine is correct. Particularly revealing is *Andino*, where this Court applied *Purcell* to stay an injunction pending appeal. As Justice Kavanaugh noted in concurrence, "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.'" *See* Wise Appl. at 23-24 (citing *Andino*, 2020 WL 5887393, at *2). NCSBE, in consultation with the North Carolina Attorney General's Office, decided that it would provide certainty and clarity to North Carolina's election rules—and protect voters' constitutional rights—by entering into a Consent Judgment in state court, as it was authorized to do. *Purcell* and *Andino* counsel this Court not to interfere in that decision.

Purcell also instructs that to the extent possible, the federal judiciary should seek to maintain the status quo close to elections, and an injunction here would do just the opposite. Applicants misconstrue the current state of affairs, falsely suggesting that the Court would be *enforcing* the status quo by issuing an injunction. *See* Moore Appl. at 25. That is incorrect. The Consent Judgment and accompanying Numbered Memos have been implemented and currently have the force of law; this Court would alter, not maintain, the status quo by issuing the requested injunction. *See, e.g.*, *Growe*, 507 U.S. at 35 (noting that a state court redistricting order, by declaring the legislature's redistricting plan unconstitutional and "adopting a legislative plan to replace it, altered the status quo: The state court's plan became the law of Minnesota."). *Purcell* counsels against a federal court altering the status quo as Applicants request, a concern that applies with significant force where Applicants seek to alter election procedures and the deadlines for the receipt of ballots, with little more than ten days remaining before election day.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that this Court deny Applicants' emergency application for writ of injunction.

DATED: October 24, 2020

Respectfully submitted,

s/ Marc E. Elias

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IN THE SUPREME COURT OF THE UNITED STATES

PATSY J. WISE, *et al.*,

Applicants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, *et al.*,

Respondents,

&

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, *et al.*,

Intervenor-Respondents.

On Application for Writ of Injunction Pending Appeal from the United States Court of Appeals for the Fourth Circuit

APPENDIX TO INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION

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Appeal Docketed: October 22, 2020

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FILED: October 20, 2020

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2104

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees,

and

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

Intervenors/Defendants – Appellees.

No. 20-2107

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees,

and

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

Intervenors/Defendants – Appellees.

O R D E R

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

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

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

For the Court

/s/ Patricia S. Connor, Clerk

WYNN, Circuit Judge, denying emergency injunctive relief:

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

V.

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

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

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

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

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

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

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

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

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

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

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

VI.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I.

A.

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

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

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

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

B.

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

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

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

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

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

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

C.

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

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

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

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

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

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

II.

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

A.

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

III.

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

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

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

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

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

C.

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

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

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

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

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

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

* * *

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

IV.

Our proposed injunction pending appeal would read as follows:

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

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

NIEMEYER, Circuit Judge, dissenting:

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

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

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

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

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

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

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

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

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

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

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

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

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

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

I. BACKGROUND

A. Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Factual Background

1. This Court's Decision in *Democracy*

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

2. Release of the Original Memo 2020-19

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

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

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

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

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

3. Rescission of Numbered Memo 2020-19

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

4. Revision of Numbered Memo 2020-19

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

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

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

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

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

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

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

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

5. Numbered Memoranda 2020-22 and 2020-23

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Procedural History

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

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

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

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

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

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

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

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

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

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

D. Preliminary Injunction Standard of Review

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

II. ANALYSIS

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

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

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

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

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

A. Rooker-Feldman Doctrine

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

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

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

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

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

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

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

B. Abstention

1. Colorado River Abstention

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

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

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

2. Pennzoil Abstention

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

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

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

3. Pullman Abstention

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

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

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

C. Issue Preclusion

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

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

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

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

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

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

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

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

D. Plaintiffs' Equal Protection Claims

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

1. Voting Harms Prohibited by the Equal Protection Clause

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

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

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

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

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

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

2. Standing to Bring Equal Protection Claims

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

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

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

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

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

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

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

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

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

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

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

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

a. Vote Dilution

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

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

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

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

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

b. Arbitrary and Disparate Treatment

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

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

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

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

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

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

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

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

3. Likelihood of Success on the Merits

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

a. Parties' Arguments

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

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

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

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

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

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

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

b. Analysis

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

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

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

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

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

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

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

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

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

i. Witness Requirement Cure Procedure

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

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

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

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

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

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

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

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

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

(Footnote continued)

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

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

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

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

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

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

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

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

ii. Receipt Deadline Extension

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

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

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

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

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

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

iii. Drop Box Cure Procedure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iv. Postmark Requirement Changes

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

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

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

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

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

4. Irreparable Harm

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

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

5. Balance of Equities

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

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

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

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

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

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

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

E. Plaintiffs' Electors Clause and Elections Clause Claims

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

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

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

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

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

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

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

1. Elections Clause

a. Standing

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

i. Standing in Wise

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

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

ii. Standing in Moore

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

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

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

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

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

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

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

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

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

2. Merits of Elections Clause Claim

a. The 'Legislature' May Delegate to SBE

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

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

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

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

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

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

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

b. Whether SBE Exceeded Legitimate Delegated Powers

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

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

i. SBE's Authority to Avoid Protracted Litigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Elimination of the Witness Requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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

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

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

This the 14th day of October, 2020.

William L. Osteen, Jr.
United States District Judge

Supreme Court of North Carolina

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Raleigh, NC 27602

From N.C. Court of Appeals
(P20-513)
From Wake
(20CVS8881)

23 October 2020

Mr. R. Scott Tobin
Attorney at Law
TAYLOR ENGLISH DUMA LLP
4208 Six Forks Road
Suite 1000
Raleigh, NC 27609

RE: NC Alliance For Retired Americans, et al. v NC State Board of Elections, et al. - 440P20-1

Dear Mr. Tobin:

The following order has been entered on the motion filed on the 22nd of October 2020 by Intervenor-Defendants (Republican National Committee, et al.) for Immediate Action on Request for Temporary Stay Pending Review of Petition for Writ of Supersedeas:

"Motion Allowed by order of the Court in conference, this the 23rd of October 2020."

Beasley, CJ., 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)
Lexis-Nexis - (By Email)

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From N.C. Court of Appeals
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From Wake
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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

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23 October 2020

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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

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North Carolina Court of Appeals

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Raleigh, NC 27602

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
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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

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
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
tsteed@ncdoj.gov

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

By: Burton Craige
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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

Byron Collins

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

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.

---

[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.

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[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.

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

The undersigned hereby certifies that the forgoing document was served on the following parties via email:

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This the 5th day of October, 2020.

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TO: Governor Roy Cooper; Speaker Tim Moore; President Pro Tempore Phil Berger; Joint Legislative Elections Oversight Committee; Joint Legislative Oversight Committee on General Government; and House Select Committee on COVID-19, Continuity of State Operations Working Group

FROM: Karen Brinson Bell, Executive Director

RE: Recommendations to Address Election-Related Issues Affected by COVID-19

DATE: March 26, 2020

The spread of the novel coronavirus (COVID-19) impacts the conduct of elections and daily operations for the State Board of Elections (State Board) and county boards of elections. In response, our agency has taken a number of actions in recent days and weeks to address election-related impacts of the pandemic and inform the public about our efforts. These include:

- An emergency Executive Order issued on March 20, 2020, that, among other things, rescheduled the Republican second primary in Congressional District 11 from May 12, 2020, to June 23, 2020.

- An amended Administrative Rule 08 NCAC 01 .0106, by both emergency and proposed temporary rulemaking, to clarify the Executive Director's statutory authority to exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by a natural disaster, extremely inclement weather, or armed conflict. The amendment clarifies that a catastrophe arising from natural causes includes a disease epidemic or other public health incident that makes it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting place or that creates a significant risk of physical harm to persons in the voting place, or that would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

- Numbered Memo 2020-11, released on March 15, 2020, provides guidance on immediate actions that may be taken by authority of the Executive Director and other steps that may be taken by county boards of elections.

- Establishment of a working group of State and county election officials to consider immediate steps that should be taken for the conduct of the federal second primary and also more long-term steps including legislative requests to administer elections in times of disease epidemics, necessary measures if mail balloting were expanded, and efforts that must be taken to ensure the health and well-being of voters and workers during in-person voting.

- A statement released by the NCSBE on March 12, 2020.

While the State Board will continue to administer elections in the wake of COVID-19 within our current legal authority, the State Board respectfully recommends the General Assembly consider making the following statutory changes to address the impacts of the coronavirus pandemic on our elections. We believe that, in order to ensure continuity and avoid voter confusion, the changes should be made permanent, except where indicated otherwise.

- **Expand options for absentee requests.** We recommend allowing a voter to submit an absentee ballot request form by fax and email. Current law restricts the return of the absentee request form to the voter and the voter's near relative or legal guardian, and restricts the methods by which the requests can be returned to in-person or by mail or designated delivery service. We also recommend a limited exception to G.S. § 163-230.2(e)(2) to allow county boards of elections to pre-fill a voter's information on an absentee request form. The voter or near relative would still be required to sign the form, but this change would allow voters who are home due to COVID-19 to request an absentee request form by phone and have a pre-filled form sent to them rather than having to travel to the county board office to receive assistance.

- **Establish online portal for absentee requests.** The State Board expects a large increase in the number of voters who choose to vote absentee by mail this year, and creating an online portal for absentee voting would make it easier for voters to request an absentee ballot from home. The voter or near relative would provide identifying information (including the voter's date of birth and the last four digits of the voter's Social Security or drivers license number), and an electronic signature as defined in G.S. § 66-312 of the Uniform Electronic Transaction Act would be permitted. An allocation of funds to purchase a program or application to support this functionality may be needed.

- **Allow a voter to include a copy of a HAVA document with their absentee request form if the voter is unable to provide their drivers license number or last four digits of their Social Security number.** We recommend allowing a voter who did not include their drivers license number or the last four digits of their Social Security number the option to include a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing the name and address of the voter. Making this change to G.S. § 163-230.2 would make it easier for those who wish to vote absentee by-mail to do so. The State Board has received multiple reports from county boards of elections and from voters that, without this option, some voters are no longer able to request an absentee ballot. This particularly affects senior citizens who may not have a drivers license number and cannot recall or do not have access to their Social Security number. Allowing this option will make it easier for those most at risk of contracting COVID-19 to vote absentee by mail.

- **Establish a fund to pay for postage for returned absentee ballots.** Elections officials across the nation are anticipating a surge in absentee voting in light of

restrictions on movement imposed due to the spread of COVID-19. Prepaid postage would increase the likelihood that a voter would return their ballot, would eliminate the need for a voter to leave their home to purchase postage, and would also decrease any incentive for a voter to turn their ballot over to someone else. Prepaid postage for the return of absentee ballots would also further enable residents and patients of facilities such as nursing homes and group homes to return their ballots safely, easily, and with minimal human contact.

- **Reduce or eliminate the witness requirement.** In light of social distancing requirements to prevent the spread of COVID-19, we recommend reducing the witness requirement for the certification on absentee container-return envelopes. Currently, a voter must have their absentee envelope signed by two witnesses or one notary. North Carolina residents are currently being asked to stay at home, and without a timeline for when the disease will be under control, requiring only one witness would reduce the likelihood that a voter would have to go out into the community or invite someone to their home to have their ballot witnessed. Eliminating the witness requirement altogether is another option and would further reduce the risk.

- **Modify procedure for counting of ballots on Election Day.** To allow county boards of elections more time to process the anticipated surge in absentee ballots, we recommend amending the law to provide that ballots received by the Saturday prior to the election must be counted on Election Day, and all other absentee ballots that are timely received will be counted on the day of the canvass. Currently, G.S. § 163-234(2) requires county boards to meet on Election Day to count all absentee ballots received by 5:00 p.m. on the day before the election. Changing the timeframe for when absentee ballots are counted would help ease the burden of an increased volume of absentee ballots, especially in larger counties. This change would not affect the deadline for the county boards to receive absentee ballots, nor would it affect which ballots are counted; rather, it would ameliorate the anticipated increase in absentee ballots received by county boards between the Saturday before the election and 5:00 p.m. on the day before the election. As part of this change, we also recommend extending county canvass to 14 days after the election, rather than 10 days after the election as provided in G.S. § 163-182.5(b), to allow county boards of elections sufficient time to count the large number of ballots that are anticipated being received; State Board canvass would also need to extended accordingly.

- **Temporarily modify restrictions on assistance in care facilities.** Currently, G.S. § 163-226.3(a)(4) makes it a Class I felony for an owner, director, manager, or employee of a hospital, clinic, nursing home, or adult care home to assist a voter in that facility in requesting, voting, or returning the voter's absentee ballot. There are important reasons to discourage facility employees from assisting patients and residents with their absentee requests and with voting their ballots. However, many localities are currently restricting or banning visitors to facilities, and an Executive Order issued by the Governor prevents visitors altogether to reduce the spread of COVID-19. With this in mind, it may not be possible for

multipartisan assistance teams (MATs), or others who would traditionally assist facility residents, to provide assistance. Individuals may also be unwilling to serve on MATs due to the increased risk of transmission of COVID-19 at a facility. Many voters in these facilities do require help with requesting, voting, and/or returning their ballots, and with no option available for assistance they may effectively be disenfranchised. We suggest considering options, such as temporarily allowing a facility employee to assist, to ensure these voters are able to continue to exercise their right to vote.

- **Clarify authorization for telephonic meetings.** It would be helpful to clarify that telephonic meetings and meetings held by other remote means are specifically authorized by the open meetings law. State Board counsel construe Article 33C of Chapter 143 to permit telephonic and other remotely held meetings. However, the UNC School of Government has a different interpretation of the law based on its stated familiarity with the law's history.

- **Expand student pollworker program.** We are recommending expanding the student pollworker program to allow students to fill the role of judge or chief judge, to allow juniors or seniors to serve as long as they are at least 16 years old, and to allow service as a pollworker to count as an approved school trip. Chief judges and judges would still be appointed from recommendations provided by the political parties. Currently, G.S. § 163-42.1 requires students be at least 17 years old and only allows them to serve in the role of precinct assistant. It also requires the principal of the student's school to recommend the student; we suggest this section include an exception to that requirement if the school is closed. These changes would increase the county boards of elections' recruitment of students, who tend to be less at risk of COVID-19. The changes will be especially necessary if large numbers of pollworkers are unable to serve. The average age of pollworkers in North Carolina is around 70 and the role requires significant interaction with the public, so we anticipate that pollworkers in at-risk categories may be advised not to serve or may be unable to serve this year.

- **Make Election Day a holiday.** Designating Election Day as a State holiday would expand the potential pool of pollworkers to students, teachers, and younger individuals. It would also encourage state and county employees to work the polls. These groups tend to be in a lower-risk category for COVID-19 and therefore would be an asset given current concerns. An alternative option would be to provide paid leave for state and county employees who serve as pollworkers and providing course credit for student pollworkers.

- **Increase pay for pollworkers.** Precinct officials safeguard the democratic process and help ensure confidence in the system. Increasing pay for pollworkers will help county boards of elections recruit and retain a strong elections workforce this year and for years to come. Current pay for precinct officials is the state minimum wage, $7.25 per hour. G.S. § 163-46. On Election Day, pollworkers must serve for the entire day without leaving the site—a shift of more than 14 hours. The minimum wage requirement was put in place in 1981 (see Session

Law 1981-796). Ensuring that pollworkers' unemployment benefits are not affected by their service is another way to increase recruitment efforts.

- **Eliminate requirement that a majority of pollworkers reside in precinct.** Eliminating the requirement in G.S. § 163-41(c) that a majority of pollworkers at a polling place must reside in the precinct would provide county boards of elections with greater flexibility to staff their precincts. It would increase the likelihood a county board of elections would be able to keep a polling place open rather than having to combine it with another polling place to meet the residency requirement.

- **Temporarily suspend purchase and contract requirements for elections-related supplies and other items.** To allow the State Board and county boards to continue operating in a time when many business and government entities have reduced capacity or have closed, temporarily lifting the purchase and contract requirements of Article 3 of Chapter 143 in 2020 would significantly speed up the ability to procure necessary supplies.

- **Match HAVA funds.** In order to receive federal elections security funds that were authorized in late 2019, the State must make a 20% match. This funding will be indispensable in our agency's continued effort to secure North Carolina's elections. This is true even more so as we react and respond to the pandemic, since times of crisis and uncertainty increase the threats of cyber attacks, phishing attempts, and scams. Federal authorities have also indicated these funds may be used for COVID-19 response efforts such as cleaning supplies and protective masks for staff and pollworkers, resources to meet an unanticipated increased demand for mail ballots due to self-isolation and quarantine in response to COVID-19, and temporary staff to process the increased absentee ballot demand. Funds may also be used for costs incurred to communicate law changes, such as changes in absentee-by-mail ballot rules, that could result from the pandemic. Exempting HAVA-funded positions at the State Board from a possible hiring freeze would also be important to ensuring the agency is able to continue to secure the statewide voter registration database and many other duties to protect North Carolina's elections from cyber threats.

- **One-Stop.** Consider whether changes to one-stop requirements, such as site and hour requirements, may be needed in light of the uncertainty regarding containment of the COVID-19 pandemic by the early voting period in October 2020. Currently, if any one-stop site is open all one stop-sites must be open and all sites other than the county board office must be open 8:00 a.m. to 7:30 p.m. County boards of elections need flexibility to determine hours because they are affected differently by, and respond differently to, the COVID-19 pandemic.

While the situation with COVID-19 is changing on a daily and sometimes hourly basis, we believe the above recommendations will help the elections that form the basis of North Carolina's democracy remain strong and resilient in these uncertain times.

We are appreciative of the appointment of the House Select Committee on COVID-19, Continuity of State Operations Working Group, and I stand ready to answer your questions or provide any other information that may be useful in consideration of these recommendations.

Sincerely,

Karen Brinson Bell
Executive Director
State Board of Elections

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TO: Governor Roy Cooper; Speaker Tim Moore; President Pro Tempore Phil Berger; Joint Legislative Elections Oversight Committee; Joint Legislative Oversight Committee on General Government; House Select Committee on COVID-19, Continuity of State Operations Working Group; House Democratic Leader Darren Jackson; Senate Democratic Leader Dan Blue

FROM: Karen Brinson Bell, Executive Director

RE: CARES Act Request and Clarification to Recommendations to Address Election-Related Issues Affected by COVID-19

DATE: April 22, 2020

We write to provide you with updated information regarding our legislative requests made on March 26, 2020, including estimated costs and the timeframes for when changes would need to be made. We are also writing to provide additional detail about the Coronavirus Aid, Relief, and Economic Security (CARES) Act requirements that we received last week. On April 6, 2020, we were informed of North Carolina's award of $10,897,295 under the CARES Act, which was appropriated "to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle." The State match requirement is 20%, or $2,179,459.

We have completed two trainings to better understand how the match may be met and how the funds may be applied. Some key points are:

- The funds are for additional costs, either new or increased, associated with the national emergency related to coronavirus.
- All funds must be spent or incurred by December 31, 2020 or returned to the federal government.
- Pre-award costs may be included if they were incurred on or after January 20, 2020.
- The State match may be funded over two years and may also be met:
    - By direct funding of the State;
    - By indirect or direct costs incurred by the State Board of Elections, county boards of elections, and/or partners supporting state or county election boards to conduct elections through this pandemic; and/or,
    - Through in-kind contributions. We are working with the National Association of State Election Directors to identify hand sanitizer and other supplies that may be provided free of charge if available.

To date, we have identified $58,962 already incurred by the State Board of Elections, county boards of elections, and supporting entities that can be credited towards the State's match. This includes $38,031 in indirect costs incurred by the State Board of Elections; $14,931 in direct costs incurred by the county boards of elections; and $6,000 in in-kind donations.

We therefore are requesting state funding of $2,120,497 to receive the $10+ million awarded to North Carolina.

Through these funds we can offset significant new and increased costs to the counties because of a projected 30% to 40% voter absentee-by-mail participation rate (compared to a 4% to 5% rate traditionally), the need to more thoroughly sanitize and improve hygiene methods during one-stop early voting and on Election Day, and to address possible poll worker shortage due to illness or reluctance or inability to serve. The CARES Act funds would directly assist counties through bulk purchases, state purchase and distribution to the counties, or through reimbursement, and could include but are not limited to the cost of:

- One-time-use pens and styluses for each voter, or sanitization of reusable supplies
- Hand sanitizer and masks for voters, poll workers, and election staff
- Social distancing tools and protective devices such as face shields, stanchions and plexiglass shields at check-in stations
- Facility rental fees to assist counties in moving to sites large enough to accommodate social distancing, including former department stores or grocery stores, if available
- Facility cleaning fees before, during, and after the election
- Increased postage costs due to a higher volume of absentee-by-mail requests
- Mail tracking software to help the voter understand where their ballot is in the process and to help the counties prepare for the volume of incoming returned ballots
- Cost of additional absentee-by-mail envelopes and other supplies

Just to conduct the General Election statewide on Election Day, we will operate nearly 2,700 voting sites with approximately 18,000 workers employed for 14 to 16 hours. We are preparing for more than 4.5 million voters to vote in-person or by-mail in this election. To ensure the health and safety of the voters and workers, the costs add up quickly. And while we would like to think that coronavirus will be a distant memory by November, we must prepare to address lingering fears, new social norms, and the possibility that the virus could reoccur seasonally as do influenza and other viruses. As elections officials, we must prepare for the worst-case scenario to ensure that voters are able to cast their ballots. All of this means we need legislative approval for the associated State match to move forward with the CARES Act funding.

Procuring and purchasing these supplies must happen now to ensure delivery by July when counties will begin to assemble their supply kits, train poll workers, and receive orders from print houses. We must also be mindful that all 50 states and territories will be implementing similar procedures for the same Election Day and the supply chain is very stressed to meet the demands.

For these reasons, we also request that the General Assembly move forward with the following recommendations during the special session beginning April 28, 2020. These are immediate needs that apply to the 11th Congressional District Republican Second Primary, the new Columbus County Commissioner District 2 Republican Primary, and the 2020 General Election. Particular to the General Election, because of the high expected turnout for a presidential general election, supplies must be ordered, printing changes must be submitted and scheduled with print houses, and other changes or orders should be completed by June 15, 2020 to meet deadlines associated with that election, which starts with absentee-by-mail voting on September 4, 2020. The recommendations needing immediate consideration for all three elections are:

- **Match CARES Act funds** as outlined above.

- **Match HAVA** funds as outlined in my March 26, 2020 letter.

- **Temporarily suspend purchase and contract requirements for elections-related supplies and other items.** Because of the time limitations and amount of supplies needed to protect voters and pollworkers from COVID-19, the State Board and county boards may have difficulty complying with procurement processes without the temporary suspension. This change would need to happen right away as we are currently attempting to procure many supplies due to the upcoming second primary and the shortages that have occurred with so many states competing for resources.

    - No additional expected cost

- **Expand options for absentee requests (allow requests by fax and email).** We recommend allowing a voter to submit an absentee ballot request form by fax and email to allow voters to submit their absentee requests without leaving their home or needing to purchase stamps or envelopes. This change needs to be made as soon as possible as voters may already request absentee ballots for the June 23 and November 3 elections.

    - No additional expected cost

- **Allow a voter to include a copy of a HAVA document with their absentee request form if the voter is unable to provide their driver's license number or last four digits of their Social Security number.** Restoring this option will make it easier for those most at risk of contracting COVID-19 to vote absentee by-mail. This change is needs to be made as soon as possible as voters may already request absentee ballots for the June 23 and November 3 elections.

    - No additional expected cost

- **Reduce or eliminate the witness requirement for absentee ballots.** Most voters, under current law, would have to invite another adult into the voter's home to complete the voting process since most voters do not live with two other individuals age 18 or older. This increases the risk of transmission or exposure to disease. By reducing the witness requirement to one witness during a disease epidemic, we can effectively conduct

absentee-by-mail voting while reducing a voter's risk of disease. Additionally, it should be noted that we continue to support restricting the return of absentee-by-mail ballots to the voter or near relative as enacted by Session Law 2019-239. It is necessary to make the change now in order to update the absentee instructions and return envelope, since these will need to be redesigned by June and printed in early July to ensure the counties can meet the start of absentee-by-mail voting on September 4, 2020.

An alternative option, and one that could be carried out beyond the 2020 General Election, is to consider signature matching software. Software is available to compare the voter's signature on file to the signature provided on the absentee-ballot return envelope. Moving to this verification process would eliminate the need for witnesses.

- No additional expected cost to reducing witness requirement. Software would have added cost, but we do not yet have information about the expected cost.

- **Temporarily modify restrictions on assistance in care facilities.** Many localities are currently restricting or banning visitors and family members to facilities, and an Executive Order issued by the Governor prevents visitors altogether to reduce the spread of COVID-19. Additionally, across the state, care facilities have tragically experienced large numbers of coronavirus cases and deaths. We do not know what the conditions will be like when absentee voting occurs from September to November this year. With this in mind, it may not be possible for multipartisan assistance teams (MATs), or others who would traditionally assist facility residents, to provide assistance. Many voters in these facilities do require help with requesting, voting, and/or returning their ballots, and with no option available for assistance, they may effectively be disenfranchised. We suggest considering options, such as temporarily allowing a facility employee to assist, to ensure these voters are able to continue to exercise their right to vote. Similar to states like Indiana, two trained facility employees not of the same political party could be designated to administer voting and could be trained accordingly by the county board prior to serving in this capacity. Election officials could then transport materials to and from the facility with chain of custody procedures documenting the acceptance of materials by the designated facility administrators. It is necessary to make this change as soon as possible to designate and train appropriate individuals to serve in facilities.

  - No additional expected cost

- **Expand student pollworker program** and **eliminate requirement that a majority of pollworkers reside in the precinct.** We recommend this change be made immediately because there are shortages in some polling places in the 11th Congressional District Republican Second Primary and the new Columbus County Commissioner District 2 Republican Primary that may require transferring voters to another precinct.

  - No additional cost expected

We also request the General Assembly move forward with the following recommendations during the special session beginning April 28, 2020. These are immediate needs, but it is not possible to implement them for the 11th Congressional District Republican Second Primary and the new Columbus County Commissioner District 2 Republican Primary. Because of deadlines associated with the 2020 General Election, however, there is an immediate need to prepare for a coronavirus response:

- **Establish online portal for absentee requests.** This change would need to be made immediately due to the time required to acquire software, modify the State Board of Elections' Statewide Elections Information Management System (SEIMS), and inform the public of the change prior to the start of absentee voting on September 4, 2020.

    - We have received a quote from a vendor who supports numerous states and jurisdictions throughout the country. Based upon the volume projected for North Carolina, the annual license fee is $398,000 with a pre-election configuration fee of $25,950.

- **Establish a fund to pay for postage for outbound and returned absentee ballots.** We would request any funds be allocated as soon as possible to allow county boards of elections to budget for the election and in light of the budgetary reductions they are already being requested to make at the county level.

    - The estimate for prepaid postage for the November general election, based upon 65% of registered voters participating in the election and 40% of those participating by mail, would be $3,640,000, at a cost of approximately $2 total per ballot (7 million voters x 65% overall participation=4,550,000 participating voters with 40% participating by mail=1,820,000 by mail ballots). This prepaid cost would include both the outgoing and incoming postage cost. Envelope size and weight may affect this estimate.

- **Modify one-stop site and hour requirements.** We recommend any changes be made as soon as possible to allow time for county boards of elections to locate and procure appropriate sites, a process that has already begun for the November 3 election.

    - We expect a change would reduce costs for the county boards of elections. Due to the uncertainty of any possible change, it is not currently possible to estimate the savings.

We appreciate the dialogue we have had with many of you through this process and uncharted waters. Our goal is to "prepare for the worst" in hopes that we are overly prepared. Elections administration, as we have discussed, is a planning and logistics operation. The bulk of an election is executed before voting ever begins, which is why we come before you now. If we can secure the funds needed and know any legislative changes that may occur, then we can better prepare and deliver successful elections under normal conditions or in times of crisis.

I stand ready to answer your questions or provide any other information that may be useful in consideration of these funding requests and recommendations.

Sincerely,

Karen Brinson Bell
Executive Director
State Board of Elections

GOVERNOR

Governor Cooper Signs Five Bills into Law

Raleigh

Jun 12, 2020

Today, Governor Roy Cooper signed the following bills into law:

- Senate Bill 315: North Carolina Farm Act of 2019-20 (https://click.icptrack.com/icp/relay.php?r=&msgid=478724&act=111111&c=1346310&destination=https%3A%2F%2Fwww.ncleg.gov%2FSessions%2F2019%2FBills%2FSenate%2FPDF%2FS315v11.pdf)
- House Bill 1063: Fund VIPER Tower Hardware Upgrades (https://click.icptrack.com/icp/relay.php?r=&msgid=478724&act=111111&c=1346310&destination=https%3A%2F%2Fwww.ncleg.gov%2FSessions%2F2019%2FBills%2FHouse%2FPDF%2FH1063v2.pdf)
- House Bill 1187: Raise the Age Funding (https://click.icptrack.com/icp/relay.php?r=&msgid=478724&act=111111&c=1346310&destination=https%3A%2F%2Fwww.ncleg.gov%2FSessions%2F2019%2FBills%2FHouse%2FPDF%2FH1187v3.pdf)
- Senate Bill 390: Dupont State Forest – Financial Study (https://click.icptrack.com/icp/relay.php?r=&msgid=478724&act=111111&c=1346310&destination=https%3A%2F%2Fwww.ncleg.gov%2FSessions%2F2019%2FBills%2FSenate%2FPDF%2FS390v5.pdf)
- House Bill 1169: Bipartisan Elections Act of 2020 (https://click.icptrack.com/icp/relay.php?r=&msgid=478724&act=111111&c=1346310&destination=https%3A%2F%2Fwww.ncleg.gov%2FSessions%2F2019%2FBills%2FHouse%2FPDF%2FH1169v7.pdf)

Governor Cooper shared this statement on HB 1169:

"Making sure elections are safe and secure is more important than ever during this pandemic, and this funding is crucial to that effort. This legislation makes some other positive changes, but much more work is needed to ensure everyone's right to vote is protected."

###

This press release is related to:

Governor's Office (/news/press-releases)

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THOMAS J. MARSHALL
GENERAL COUNSEL
AND EXECUTIVE VICE PRESIDENT

UNITED STATES POSTAL SERVICE

AUG 13 2020

July 30, 2020

Honorable Elaine Marshall
North Carolina Secretary of State
P.O. Box 29622
Raleigh, NC 27626-0622

Dear Secretary Marshall:

Re: Deadlines for Mailing Ballots

With the 2020 General Election rapidly approaching, this letter follows up on my letter dated May 29, 2020, which I sent to election officials throughout the country. That letter highlighted some key aspects of the Postal Service's delivery processes. The purpose of this letter is to focus specifically on the deadlines for requesting and casting ballots by mail. In particular, we wanted to note that, under our reading of North Carolina's election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards. This mismatch creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them.

As I stated in my May 29 letter, the two main classes of mail that are used for ballots are First-Class Mail and USPS Marketing Mail, the latter of which includes the Nonprofit postage rate. Voters must use First-Class Mail (or an expedited level of service) to mail their ballots and ballot requests, while state or local election officials may generally use either First-Class Mail or Marketing Mail to mail blank ballots to voters. While the specific transit times for either class of mail cannot be guaranteed, and depend on factors such as a given mailpiece's place of origin and destination, most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received.

To account for these delivery standards and to allow for contingencies (e.g., weather issues or unforeseen events), the Postal Service strongly recommends adhering to the following timeframe when using the mail to transmit ballots to domestic voters:

- **Ballot requests:** Where voters will both receive and send a ballot by mail, voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time.

- **Mailing blank ballots to voters:** In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters. Using Marketing Mail will result in slower delivery times and will increase the risk that voters will not receive their ballots in time to return them by mail.

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- **Mailing completed ballots to election officials:** To allow enough time for ballots to be returned to election officials, domestic 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. So, for example, if state law requires a mail-in ballot to be postmarked by Tuesday, November 3, and received by Friday, November 6, voters should mail their ballot by Friday, October 30, to allow enough time for the ballots to be delivered by November 6. Voters must also be aware of the posted collection times on collection boxes and at the Postal Service's retail facilities and that ballots entered after the last posted collection time on a given day will not be postmarked until the following business day.

Under our reading of your state's election laws, as in effect on July 27, 2020, certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards and the recommended timeframe noted above. As a result, to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, 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.

Specifically, it appears that a voter may generally request a ballot as late as 7 days before the November general election, and that a completed ballot must be postmarked by Election Day and received by election officials no later than 3 days after the election. If a voter submits a request at or near the ballot-request deadline, and if the requested ballot is transmitted to the voter by mail, there is a risk that the ballot will not reach the voter before Election Day, and accordingly that the voter will not be able to use the ballot to cast his or her vote. That risk is exacerbated by the fact that the law does not appear to impose a time period by which election officials must transmit a ballot to the voter in response to a request. Even if the requested ballot reaches the voter by Election Day, there is a risk that, given the delivery standards for First-Class Mail, a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state's receipt deadline of November 6. As noted above, voters who choose to mail their ballots should do so no later than Friday, October 30.

To be clear, the Postal Service is not purporting to definitively interpret the requirements of your state's election laws, and also is not recommending that such laws be changed to accommodate the Postal Service's delivery standards. By the same token, however, the Postal Service cannot adjust its delivery standards to accommodate the requirements of state election law. For this reason, the Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail. It is particularly important that voters be made aware of the transit times for mail (including mail-in ballots) so that they can make informed decisions about whether and when to (1) request a mail-in ballot, and (2) mail a completed ballot back to election officials.

We remain committed to sustaining the mail as a secure, efficient, and effective means to allow citizens to participate in the electoral process when election officials determine to utilize the mail as a part of their election system. Ensuring that you have an understanding of our operational capabilities and recommended timelines, and can educate voters accordingly, is important to achieving a successful election season. Please reach out to your assigned election mail coordinator to discuss the logistics of your mailings and the services that are available as well as any questions you may have. A list of election mail coordinators may be found on our website at: https://about.usps.com/election-mail/politicalelection-mail-coordinators.pdf.

We hope the information contained in this letter is helpful, and please let me know if you have any questions or concerns.

Sincerely,

Thomas J. Marshall

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILED
2020 AUG 18 P 2:23
WAKE CO., C.S.C.

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, 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.

AMENDED COMPLAINT

Plaintiffs, complaining of Defendants, say and allege:

INTRODUCTION

1. The current public health crisis caused by the novel coronavirus (hereinafter, "COVID-19") has upended daily life in North Carolina and threatens to wreak havoc on its electoral system. On March 10, Governor Roy Cooper declared a state of emergency and has since issued orders requiring North Carolinians, consistent with guidance from public health officials, to "[m]aintain at least six (6) feet social distancing from other individuals"; wear face coverings when leaving home; and minimize unnecessary interactions with individuals outside of

their homes in an effort to slow the rapidly increasing number of positive COVID-19 cases.[1] Because there is no known cure for COVID-19, and infections continue to rise, these measures designed to slow the spread of the virus are likely to continue through the November 3, 2020 general election ("November election").

2. For these reasons, the State Board of Elections (the "State Board") has acknowledged that voting by mail will expand dramatically, predicting an 800-percent increase in upcoming elections. The State Board has further acknowledged that in-person voting will be significantly impacted due to a shortage of poll workers and polling sites that can accommodate large numbers of voters while complying with social distancing guidelines. With the November election fast approaching, the State is woefully underprepared, not only for the rapid expansion of absentee voters, but also for voters who will attempt to cast their ballots in person and may be forced to choose between their health and their constitutional right to vote.

3. Plaintiffs Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn and Tom Kociemba, Sandra Malone, and Caren Rabinowitz bring this lawsuit to eliminate the barriers to a free and fair election and to ensure that they, along with all other eligible North Carolinians, have a meaningful opportunity to exercise their constitutional right to vote in November.

4. Specifically, Plaintiffs challenge the State's failure to provide sufficiently accessible in-person voting opportunities that comply with social distancing guidelines during the COVID-19 pandemic, and its continued enforcement of several absentee voting restrictions and procedures that will unduly burden or deny the franchise to countless voters if applied during the November election, while the COVID-19 outbreak still threatens public safety.

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[1] *See* Governor Roy Cooper, Exec. Order No. 141 (May 20, 2020), https://files.nc.gov/governor/documents/files/EO141-Phase-2.pdf [hereinafter Exec. Order No. 141]; Governor Roy Cooper, Exec. Order No. 147 (June 24, 2020), https://files.nc.gov/governor/documents/files/EO147-Phase-2-Extension.pdf.

5. These challenged laws and procedures include: (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, despite recommendations from medical professionals and the government that all residents should practice social distancing and minimize unnecessary contact with individuals outside of the home, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (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) (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, notwithstanding the United States Postal Service's ("USPS") well-documented mail delivery delays and operational difficulties, *id.* § 163-231(b)(2) (the "Receipt Deadline"); (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 (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.G.S. § 163-226.3(a)(5) (the "Ballot Delivery Ban").

6. Taken together, these barriers (the "Challenged Provisions") to in-person and

absentee voting are not only unduly burdensome, as applied to the November election, but they also pose significant risks to voters' health and safety and will result in the disenfranchisement of untold numbers of North Carolinians, especially those who are medically and financially vulnerable. Protecting the safety of all North Carolinians during a public health crisis, while enforcing the constitutional rights to vote and to a free and fair election, will require advance planning and immediate proactive measures and accommodations to ensure adequate opportunities to cast an effective ballot (by mail or in person) notwithstanding the COVID-19 pandemic.

7. Plaintiffs therefore request that this Court issue an Order protecting the rights of North Carolina voters to participate in the November election by: (i) permitting counties to expand the early voting days and hours during the pandemic in order to increase opportunities to vote in person and minimize crowding, long lines, and the risk of exposure to COVID-19; (ii) suspending the Witness Requirement for single-person or single-adult households; (iii) requiring the State to provide pre-paid postage on all absentee ballots and ballot request forms; (iv) 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, which coincides with the earliest deadline for the receipt of uniformed-service or overseas voters' ballots; (v) enjoining election officials from rejecting ballots based on alleged signature discrepancies or mismatches without adequate guidance and training from the State Board and without providing voters notice and an opportunity to cure their ballots; (vi) allowing voters to obtain assistance from other individuals or organizations of their choice in completing and submitting their absentee ballot applications; and (vii) allowing voters to obtain assistance from other individuals or organizations of their choice in delivering ballots to election officials, and

allow third parties to provide such assistance without fear of incurring criminal penalties.

PARTIES

8. Plaintiff North Carolina Alliance For Retired Americans ("the Alliance") 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 are comprised of retirees from public and private sector unions, community organizations, and individual activists. Some of its members are disabled, and many are elderly. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance's mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The Challenged Provisions frustrate the Alliance's mission because they deprive individual members of the right to vote and to have their votes counted, threaten the electoral prospects of Alliance-endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and make it more difficult for the Alliance and its members to associate to effectively further their shared political purposes. Because of the burdens on absentee and in-person voting created by the Challenged Provisions, the Alliance will be required to devote time and divert resources from other efforts to educating its members about these requirements and assisting them in complying so that their votes are received by Election Day, accepted, and counted. These efforts will reduce the time and resources the Alliance has to educate its members and legislators on public policy issues critical to the Alliance's members, including the pricing of prescription drugs and the expansion of Social Security and Medicare and Medicaid benefits.

9. The Alliance also brings this action on behalf of its members who face burdens on their right to vote as a result of the Challenged Provisions. Because all of the Alliance's members are of an age that places them at a heightened risk of complications from coronavirus, they are

overwhelmingly likely to vote absentee this year and consequently face the burdens that the Challenged Provisions place on absentee voters. For example, some of the Alliance's members live in parts of the State where access to the Internet is sporadic and therefore cannot easily request an absentee ballot without assistance. Others are likely to face difficulty finding a witness, acquiring postage, or delivering an absentee ballot themselves should they be unable to return it through the mail in sufficient time for their ballot to be counted. Additionally, many of the Alliance's members will be absentee voting for the first time, and thus will be more susceptible to disenfranchisement by the Receipt Deadline and Signature Matching Procedures. Finally, those of the Alliance's members who are committed to voting in person, or forced to because they do not receive their absentee ballots on time, will have to choose between their health and their right to vote due to a shortage of safe, in-person voting opportunities.

10. Plaintiff Barker Fowler is a 22-year-old registered voter in Rowan County, North Carolina. Ms. Fowler is a college senior at the University of Mississippi in Oxford, Mississippi, though she is currently at home in Salisbury, North Carolina with her parents due to the pandemic. She is finishing her degree this summer and is uncertain of where she will be this October and November, as she is applying for seasonal jobs out of state. Ms. Fowler typically votes absentee because she attends school in Mississippi, and she will likely have to do so again for the November election. Nevertheless, she is concerned about her ballot arriving in time to be counted, particularly given her experience attempting to vote absentee in the March 3 presidential primary, for which she requested an absentee ballot a month before the election but did not receive it until approximately five days after the election had already passed. Her ballot was postmarked in early February, meaning that it was in transit for more than three weeks. Given her experience attempting to vote absentee in March, Ms. Fowler is very concerned about

North Carolina's Receipt Deadline, as she is not confident that, even if she were to receive her ballot on time to postmark it by Election Day, that it would arrive within three days. Moreover, she does not typically keep stamps and, as a college student facing economic uncertainty due to the pandemic, is concerned about the added time and expense required to procure proper postage.

11. Plaintiff Becky Johnson is a 73-year-old registered voter in Forsyth County, North Carolina. Ms. Johnson is a dedicated voter who usually casts her ballot in person during the early voting period. Given her age and the risks of contracting COVID-19, Ms. Johnson has been extremely careful and does not regularly leave her home, nor does she invite others into her house. When she needs to venture into the public, she engages in strict social distancing practices and always carries a mask with her. She even orders her groceries online because she does not want to expose herself to the virus through contact with others. For the same reason, Ms. Johnson plans to vote by mail in the November election; she cannot be sure that others at the polls will be as careful as she is, and she does not want to risk exposure to COVID-19. Ms. Johnson is worried, however, that her absentee ballot may not count. She is well aware of the USPS's operational difficulties and the resulting mail delays that have occurred during the pandemic, which could prevent her ballot from being delivered on time, even if she mails it well before Election Day. Given these concerns, Ms. Johnson would prefer to seek contactless assistance from a trusted friend or neighbor to return her sealed ballot. Additionally, Ms. Johnson lives alone, and she is unsure how she will comply with the Witness Requirement. She does not want to risk exposure to COVID-19 in order to have her ballot signed by a third party. Further, Ms. Johnson knows that her signature has changed over time and now looks different each time she signs a document, and she is concerned that her ballot will be rejected if her absentee ballot envelope signature does not exactly match the signature on file with her county board of

elections.

12. Plaintiff Jade Jurek is a 60-year-old registered voter in Wake County, North Carolina. Ms. Jurek has multiple sclerosis which can make voting difficult for her. Though she has voted by absentee ballot a few times in the past, she strongly prefers voting in person. Ms. Jurek usually votes during the early voting period, so that she can cast her ballot when she is feeling her best. Ms. Jurek initially considered voting by mail in the November election, but she is concerned about USPS delays and the risk of disenfranchisement. To ensure that her ballot gets counted, she is committed to voting in person, as she usually does. Ms. Jurek voted in person during the primary election and encountered long lines, a crowded polling place, and extended wait times. Though some voters at the polls were taking necessary precautions to prevent the spread of COVID-19, many were not wearing masks or gloves, and Ms. Jurek found that it was not possible to remain socially distant for the full duration of the voting process. She would be much more comfortable casting her ballot if the State were to expand early voting days and hours, so that she would have the opportunity to select a day and a location that is less crowded, which will allow her to adhere to social distancing guidelines through the entire voting process.

13. Plaintiff Rosalyn Kociemba is a registered voter in Buncombe County, North Carolina. She is a 77-year-old member of the Buncombe County Senior Democrats, and she typically votes absentee so that she can spend Election Day working at the polls. For the past five years, she has served as an official poll worker on Election Day, but this year, she plans to stay home due to the COVID-19 pandemic. Ms. Kociemba and her husband both have underlying health conditions that make them especially vulnerable to COVID-19. Therefore, Ms. Kociemba plans to vote absentee again in the November election. Although she usually hand-delivers her

absentee ballot to her county board of elections, she would prefer a contactless option this year given the potential health risks. Ms. Kociemba is also worried about slowdowns in mail delivery service given the USPS's operational difficulties during the pandemic, which could prevent her ballot from being delivered by USPS before the Receipt Deadline. As a result, she would like to seek assistance from trusted neighbors and community members to return her sealed ballot.

14. Plaintiff Tom Kociemba is a registered voter in Buncombe County. He is 75 years old, a sales and marketing professional, and a member of the Buncombe County Senior Democrats. Mr. Kociemba typically votes absentee because he is busy working at the polls on Election Day. Due to the COVID-19 pandemic, however, Mr. Kociemba does not want to take the unnecessary risk of being at an in-person voting location, particularly because he has underlying health conditions that make him vulnerable to serious illness from a COVID-19 infection. Therefore, Mr. Kociemba withdrew from serving as a poll worker (a role in which he has served for the past seven years) and will vote absentee in November. Although he usually hand-delivers his absentee ballot to his county board of elections, he would prefer a contactless option this year in order to avoid interacting with those who may not be following all the precautions necessary to prevent the spread of COVID-19. Nevertheless, he is worried that his ballot may not be delivered by the Receipt Deadline due to slowdowns in mail delivery service and the operational difficulties that USPS has encountered during the pandemic. Mr. Kociemba would like to seek assistance from trusted neighbors and community members to ensure that his sealed ballot is delivered on time.

15. Plaintiff Sandra Malone is a 53-year-old registered voter in Wake County. Ms. Malone usually votes in person and she would like to continue voting in person this year. However, she is concerned about the safety of polling places during the COVID-19 pandemic,

and the lack of adequate options for early voting sites and hours that would allow her to pick a date and time with fewer voters, which would allow her to follow social distancing guidelines through the entire voting process. Ms. Malone is also concerned that if she opts to vote by mail instead, her absentee ballot may not reach election officials by the Receipt Deadline, given evidence of the USPS's overcapacity and operational difficulties. Moreover, she is worried that her ballot may be rejected for a signature mismatch, as her signature changes every few years and rarely looks exactly the same.

16. Plaintiff Caren Rabinowitz is a 69-year-old registered voter in Guilford County. Ms. Rabinowitz recently moved to North Carolina from New York. As a new resident, this will be her second time voting in the State. She voted in person in the March 3 primary. Because Ms. Rabinowitz has underlying health conditions that place her at high risk for serious illness if she contracts COVID-19, she plans to vote by mail in the November election to avoid exposure to the virus. Dropping off her absentee ballot in person would be especially difficult because she does not drive and must rely on public transportation. Ms. Rabinowitz is concerned that her vote will not be counted if, for reasons outside of her control—like the USPS's ongoing mail delivery delays—her absentee ballot arrives after the Receipt Deadline. Further, Ms. Rabinowitz lives alone, and because she recently moved to the State, she does not have any friends or family nearby and is concerned about having to venture out in public or invite a stranger into her home to satisfy the Witness Requirement.

17. Defendant North Carolina State Board of Elections is an agency responsible for the regulation and administration of elections in North Carolina, including voting absentee.

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

JURISDICTION AND VENUE

19. This Court has jurisdiction of this action pursuant to Article 26 of Chapter 1 of the General Statutes.

20. Under N.C.G.S. § 1-81.1(a1), the exclusive venue for this action is Wake County Superior Court.

FACTUAL ALLEGATIONS

I. COVID-19 has upended the electoral process in North Carolina.

21. COVID-19 has caused widespread disruption to daily lives and routines across the globe, which has impacted elections around the country and in North Carolina. By March 10, North Carolina had reported five confirmed cases of COVID-19. Since then, the number of confirmed cases in the State has skyrocketed, and the virus has spread to all of North Carolina's 100 counties. *Id.*

22. On March 14, four days after Governor Cooper issued his first executive order declaring a state of emergency—which remains in effect as of this filing—the Governor closed public schools statewide and imposed social distancing guidelines. Since then, the Governor has issued no fewer than 29 executive orders designed to keep North Carolinians safe during the ever-evolving public health crisis.

23. Even as North Carolina gradually begins to reopen, efforts to prevent the spread of COVID-19 remain in place, including executive orders prohibiting mass gatherings—defined as "an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space,

such as an auditorium, stadium, arena, or meeting hall."[2]

24. Governor Cooper has also strongly advised residents 65 years of age and older, or who are immunocompromised, to stay home. *Id.* Visitation to long-term care facilities, including nursing homes, adult care homes, family care homes, mental health group homes, and intermediate care facilities for individuals with intellectual disabilities has been limited to "compassionate care situations." *Id.*

25. Efforts to minimize the spread of the virus or the risk of infection will require North Carolinians to exercise caution by following social distancing guidelines and avoiding large group gatherings, which "offer more opportunity for person-to-person contact with someone infected with COVID-19[.]"[3] The need for such precautions shows no signs of easing as COVID-19 cases continue to rise, even though the State is still experiencing what some have termed the first wave of infections.

26. The State Board has announced that it expects a surge in absentee ballots from approximately four percent during previous elections to 40 percent for the November election, and that it anticipates a total of 4.5 million individuals will vote by mail and in person this November. As a result, the Board has asked the General Assembly to eliminate certain restrictions that reduce access to voting by mail.

27. In a March 26, 2020 letter to Governor Cooper and the General Assembly, the State Board's Executive Director urged the General Assembly to: (1) alter early voting sites and hours requirements to allow counties to better accommodate in-person voters during the COVID-

[2] Governor Roy Cooper, Exec. Order No. 151 (July 16, 2020), https://files.nc.gov/governor/documents/files/EO151-Phase-2-Extension-1.pdf [hereinafter Exec. Order No. 151]; Governor Roy Cooper, Exec. Order No. 147 (June 24, 2020), https://files.nc.gov/governor/documents/files/EO147-Phase-2-Extension.pdf; Exec. Order No. 141 (May 20, 2020).

[3] *See* Exec. Order No. 151.

19 pandemic; (2) relax or eliminate the Witness Requirement, as well as restrictions on third-party assistance of voters in care facilities; (3) establish a fund to pay for outbound and returned absentee ballots; (4) create an online option for requesting absentee ballots, and allow them to be submitted by fax and email; and (5) enable county boards of elections to assist voters by pre-filling their information on absentee ballot request forms.

28. The State Board's Executive Director renewed this plea on April 22, 2020 and April 29, 2020, also requesting funds to account for the unprecedented expansion of absentee voting and to make polling places accessible to voters during the public health crisis—a need which the State is woefully unprepared to meet.

29. Although the General Assembly has reduced the number of signatures necessary to satisfy the Witness Requirement from two to one, allowed the State Board to create an online portal for absentee ballot requests, and permitted voters to return their absentee ballot request forms via email or fax this year, it has yet to adopt any of the above-referenced measures in full.

30. North Carolina's inaction, despite the imminent risk of widespread disenfranchisement under the State's current election procedures, threatens to repeat the chaos and disorder that has played out in one election after another across the country since the pandemic began.

31. In Wisconsin's April 7 primary, for instance, election officials knew ahead of time that in-person voting opportunities would be significantly limited due to the loss of poll workers who were over the age of 65 and feared exposure to COVID-19, and the severe reduction in the number of available polling locations. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *1 (W.D. Wis. Apr. 2, 2020). Like here, the likely consequences of holding an election in that context were clear: "(1) a dramatic

shortfall in the number of voters on election day . . ., (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19." *Id.*

32. When Wisconsin proceeded to conduct its primary election in April without adequate safeguards to address these issues, chaos and widespread disenfranchisement ensued, and cities throughout Wisconsin were forced to close polling places. In Milwaukee, more than 18,000 voters cast their ballots in person at only five polling locations, resulting in large crowds, long lines, and excessive wait times, often without regard for social distancing protocols. USPS struggled to keep up with the dramatic increase in mail voting, resulting in thousands of voters who did not receive their requested absentee ballots in time to vote and return them by Election Day, and over 100,000 more whose ballots were submitted by mail but were not delivered to election officials until well after Election Day. The disruptions in the mail delivery of absentee ballots—both in the initial distribution to voters and their return to municipal clerks' offices—were so extensive that Wisconsin's U.S. Senators wrote to the Inspector General for the USPS seeking an investigation into "absentee ballots [not] reach[ing] Wisconsin voters in time for the spring election."[4]

33. Ohio encountered similar issues in its April 28 primary. The Ohio Secretary of State reported that election officials were experiencing "missed mail deliveries" as well as delivery times "in excess of ten days" for first-class mail.[5]

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[4] WBAY.com, *Senators Johnson, Baldwin call for investigation of Wisconsin absentee ballots* (Apr. 9, 2020), https://www.wbay.com/content/news/Senators-Johnson-Baldwin-call-for-investigation-of-Wisconsin-absentee-ballots-569521331.html.

[5] Letter from Frank LaRose, Ohio Sec'y of State, to Ohio Congressional Delegation (Apr. 23, 2020), *available at* https://www.dispatch.com/assets/pdf/OH35713424.pdf.

34. In Pennsylvania's June 2 primary, USPS's operational difficulties delayed the delivery of mail ballots in both directions—from election officials to voters and from voters back to county election offices. As one county elections department explained, "[t]he source of this slowdown is a combination of systems operating at a slower rate due to the circumstances created by the COVID-19 pandemic and USPS prioritizing official election mail coming from [the County] in a manner that is not consistent with protocols that the County was informed would be in place."[6] Some county election officials went so far as to advise voters to avoid mailing back their ballots altogether and instead to hand-deliver them directly to their county board of elections, or risk disenfranchisement.

35. Pennsylvania's primary was also marred by long lines and confusion over consolidated polling places, and tens of thousands of vote-by-mail ballots that never made it to voters, which led the Governor to issue an executive order on the eve of the election, granting a seven-day extension of the deadline for the receipt of mail ballots in six counties.

36. In Georgia's June 9 primary, polling place consolidations and closures due to COVID-19 combined with malfunctioning voting machines created long lines at polling places throughout the State, with some voters casting their ballots after midnight.

37. In Kentucky's June 23 primary, the city of Louisville—with a population of approximately 600,000, 20 percent of whom are Black—had only one polling place. Long lines and traffic jams predictably followed, and a court order was required to re-open the lone polling place after it had closed for the day to allow voters who were stuck in traffic to cast their ballots.

38. In Washington, D.C.'s primary on June 2, some voters waited in line for over four

[6] Harri Leigh, *A record number of mail-in ballot applications, but will they arrive in time?* FOX43 (May 26, 2020), https://www.fox43.com/article/news/politics/elections/a-record-number-of-mail-in-ballot-applications-but-will-they-arrive-in-time/521-de6f5ff0-38eb-47a5-a935-313e6a6a1ee3.

hours, many of whom had requested absentee ballots but did not receive them in time to submit them by Election Day.

39. Michigan's August 4 primary further underscored the effect of mail delays on voting during the pandemic. As of August 6, about 10,000 absentee ballots that had been cast in the primary just two days earlier had been rejected for arriving after Election Day or due to signature mismatch. The Michigan Secretary of State's office said the number of rejected ballots would likely rise as more ballots arrived.

40. Recent statements from the USPS strongly suggest that North Carolinians will face similar challenges in submitting and receiving election mail this fall. A recent report by the Inspector General of the U.S. Postal Service confirmed that USPS "cannot guarantee a specific delivery date or alter standards to comport with individual state election law."[7] Just weeks ago, USPS announced "major operational changes" "that could slow down mail delivery" *even further*.[8] USPS will no longer pay overtime and is slashing office hours. Carriers are being directed, for the first time in USPS history, *to leave mail behind* at distribution centers if it would delay them from their routes instead of "mak[ing] multiple delivery trips to ensure timely distribution of letters and parcels," as they have historically done.[9] Since the announcement, some Americans have gone "upwards of three weeks without packages and letters, leaving them without medication, paychecks, and bills."[10]

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[7] Office of the Inspector General, *Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area*, USPS (July 7, 2020), https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf.

[8] Jacob Bogage, *Postal Service memos detail 'difficult' changes, including slower mail delivery*, WASH. POST (July 14, 2020), https://www.washingtonpost.com/business/2020/07/14/postal-service-trump-dejoy-delay-mail/ [hereinafter Bogage, *Postal Service memos detail 'difficult' changes*].

[9] *Id.* Bogage, *Postal Service memos detail 'difficult' changes.*

[10] Ellie Rushing, *Mail delays are frustrating Philly residents, and a short-staffed Postal Service is struggling to keep up*, Philadelphia Inquirer (Aug. 2, 2020),

41. The November election in North Carolina will encounter the same obstacles that have derailed other elections around the country and, unless the Challenged Provisions are enjoined, the result will be widespread disenfranchisement of countless lawful North Carolina voters.

II. The Challenged Provisions impose barriers to in-person voting during the COVID-19 pandemic.

42. Because polling places draw large numbers of individuals into enclosed spaces where, during the pandemic in particular, they have often been required to wait for hours in long lines, in-person voting presently poses a risk of transmission that can be mitigated—though not eliminated—only through the implementation of strict social distancing requirements among other health and safety measures.

43. In-person voting involves certain variables, including the physical space in which the polling place is located and the time it takes for individuals after they arrive at the site to vote their ballots, that directly operate to increase (or decrease) a voter's risk of becoming infected with or transmitting COVID-19 at the polling place.

44. Safety measures necessary to mitigate (although not eliminate) the risk of transmission include: (1) maximizing the number of polling places and expanding voting opportunities to minimize crowding and long lines; (2) ensuring social distancing is strictly enforced among poll workers and voters; and (3) ensuring availability and widespread use of personal protective equipment, hand sanitizer, and other appropriate disinfecting products.

45. Such procedures are essential in ensuring access to the franchise because North Carolinians have historically relied heavily on in-person voting, and many are expected to

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https://www.inquirer.com/news/philadelphia/usps-tracking-in-transit-late-mail-delivery-philadelphia-packages-postal-service-20200802.html.

continue to do so in 2020. In the 2018 general election, for example, less than three percent of all votes were cast by mail.

46. Despite the need for expanded in-person voting opportunities and reduced crowds, voters in the November election will encounter just the opposite: fewer voting locations and hours, packed polling places, and long lines.

47. In the June 23, 2020 Republican primary, for example, Haywood County reduced the number of polling sites from 29 to 11, and Macon County consolidated 15 polling places into just 3 sites. The State Board's Executive Director has also expressed concerns that COVID-19 will result in polling place consolidation and relocation to allow for adequate social distancing.

48. Notably, the State Board has recognized the need for expanded early voting sites to allow county boards to "reduce crowd density, shorten the time voters spend in line and at polling locations, and improve sanitation and cleanliness" so that "every eligible North Carolinian has the ability to vote without endangering herself."

49. As a result, the State Board recently issued an emergency order requiring all county boards to open at least one early voting site for a minimum of 10 hours in the first and second weekends of the early voting period and requiring county boards to offer at least one early voting site per 20,000 registered voters.

50. While these reforms are certainly a step in the right direction, without an expansion of the early voting period, county boards that offer only the minimum required number of early voting sites during the fixed 17-day early voting schedule will not alleviate the crowding, long lines, and attendant health risks that the State Board sought to avoid.

51. The COVID-19 pandemic will force counties to offer fewer polling locations than they otherwise would have under normal circumstances. Faced with poll workers unwilling to

risk exposure and potential voting sites that are either reluctant to open their doors to large crowds or inadequately equipped to follow social distancing guidelines, the State has already seen significant polling place consolidation. Indeed, it will be increasingly difficult for many counties to operate more than a few satellite early voting sites, which means that fewer cumulative early voting hours, larger crowds, and long lines await those who attempt to vote in person, creating public health risks and imposing severe burdens on the right to vote.

52. To alleviate the inevitable crowds and long lines that await in-person voters for the November election, the State must expand opportunities to cast a ballot in person, including by extending the early voting period.

53. Increasing the number of early voting days not only offsets the reduction in cumulative voting hours caused by the COVID-19 pandemic, but also minimizes the risk of daily congestion and affords North Carolinians additional options in selecting an early voting day when their polling site will be less crowded and allow for adequate social distancing.

III. The Challenged Provisions unlawfully restrict access to absentee voting during the COVID-19 pandemic.

54. Adopted in 2001, "no-excuse" absentee voting, which allows any qualified citizen to vote by mail without justification, was one of several measures adopted by the State to alleviate crowds at the polls on Election Day and expand access to the franchise. N.C.G.S. § 163-226(a). Because of absentee voting and other reforms, North Carolina saw a five-percent increase in overall voter participation—from 59 to 64 percent—between the 2000 and 2004 general elections.

55. Under normal circumstances, voting by mail expands access to the ballot box for voters whose work schedules, health conditions, family obligations, or lack of transportation make in-person voting difficult.

56. But these are not normal times. As discussed above, the COVID-19 pandemic has upended daily life in North Carolina, and voters in the upcoming November election will encounter unprecedented barriers to the ballot box, which will require the State to adopt additional safeguards and suspend restrictions that will otherwise deny voters access to a free and fair election.

A. The Witness Requirement forces voters who live alone or in single-adult households to endanger their health in order to vote in the November election.

57. The Witness Requirement mandates that each voter who returns a mail ballot must have the envelope in which that ballot is submitted to elections officials signed by both the voter and another individual 18 years of age or older certifying that they witnessed the voter complete the ballot. N.C.G.S. § 163-231(a)(1)–(4).

58. This means that, once a voter receives their absentee ballot, North Carolina law requires them to complete it in front of another adult—which often requires the voter to solicit a witness from outside their household—notwithstanding the public health risks posed by the ongoing COVID-19 pandemic.

59. As the State Board acknowledged in its March 26 memorandum, which recommended a reduction in the number of witnesses required to cast an absentee ballot from two to one, "[e]liminating the witness requirement altogether . . . would further reduce the risk" to public health posed by COVID-19.[11]

60. In April, the Board reiterated its request to amend the Witness Requirement, recognizing that voters who did not have other available witnesses in the household would be

[11] *See* March 26, 2020 Letter from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to Gov. Roy Cooper, et al. (Mar. 26, 2020), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/SBE%20Legislative%20Recommendations_COVID-19.pdf.

forced to "invite another adult into [their] home to complete the voting process," which "increases the risk of transmission or exposure to disease."[12]

61. While the General Assembly, through HB 1169, reduced the number of required witnesses from two to one (for elections held in 2020 only), the Witness Requirement, even in its current form, still imposes a significant burden on many North Carolinians.

62. More than one-fourth of North Carolina households are one-member households, as is the case for Plaintiff Caren Rabinowitz.

63. Even voters living in multi-member households will struggle to meet the Witness Requirement because it mandates that a witness must be at least 18 years old and not otherwise barred from serving as a witness.[13]

64. The burden of the Witness Requirement is exacerbated by the fact that the witnesses must be present at the time the voter marks their ballot, places it in and seals the container envelope, and completes the envelope's certification. N.C.G.S. § 163-231(a)(1)–(4).

65. Thus, voters who live alone or in a household without eligible witnesses cannot vote until they find a witness, or invite a third party into their home, at a time when it is essential

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[12] *See* April 22, 2020 Letter from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to Gov. Roy Cooper, et al. (Apr. 22, 2020), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/Outreach/Coronavirus/State%20Board%20CARES%20Act%20request%20and%20legislative%20recommendations%20update.pdf. Although the State Board requested a reduction of the number of witnesses required from two to one, its reasoning—that voters "would have to invite another adult into [their] home"—applies equally to even a single witness requirement if the voter does not reside with another adult.

[13] Under N.C.G.S. §§ 163-226.3(a)(4) and 163-237(b), an individual who is a candidate for nomination or election cannot serve as a witness unless the voter is the candidate's near relative. In addition, the following individuals are prohibited from serving as witnesses if the voter is a patient or resident of a hospital, clinic, nursing home, or rest home: An owner, manager, director, employee of the hospital, clinic, nursing home, or rest home in which the voter is a patient or resident; an individual who holds any elective office under the United States, this State, or any political subdivision of this State; and an individual who holds any office in a State, congressional district, county, or precinct political party or organization, or who is a campaign manager or treasurer for any candidate or political party; provided that a delegate to a convention shall not be considered a party officer.

for North Carolinians to minimize unnecessary interactions with individuals outside of their homes and to follow social distancing guidelines, both for their own health and the safety of the general public.

66. Complying with this requirement is impractical for many North Carolinians, and it forces them to choose between either protecting their health or exercising their right to vote.

67. Meanwhile, the State's interest in enforcing the Witness Requirement is minimal at best. Witness signatures are ineffective fraud prevention measures, illustrated by the fact that North Carolina is one of only five states that still enforces them.

68. Notably, North Carolina does not impose the same Witness Requirement upon uniformed-service voters or overseas voters registered in North Carolina who vote mail ballots.

69. It also defies logic to suggest that the Witness Requirement will deter individuals who plan to commit perjury and cast an absentee ballot fraudulently. Such individuals are unlikely to draw the line at forging a witness's signature. Instead, the requirement burdens and punishes those who attempt to follow the letter of the law and are least likely to be engaged in any misconduct.

B. The Postage Requirement imposes monetary and transaction costs which are exacerbated by the pandemic.

70. A significant number of voters will be forced to mail their absentee ballots (because they either lack access to transportation or are unwilling to risk potential exposure to COVID-19 in order to deliver their ballots in person) and must pay a postage fee to do so.

71. Thus, in order to submit their absentee ballots while minimizing the risk of COVID-19 infection, many North Carolinians must incur monetary expenses and other transaction costs that bear most heavily on financially vulnerable members of the electorate who are least able to navigate these burdens.

72. This burden does not fall on all absentee voters in North Carolina. Uniform-service and overseas voters may submit absentee ballot requests by email, thereby avoiding incurring the postage to do so. *Id.* § 163-258.4(c). Moreover, these same voters need not pay for postage to mail back their completed absentee ballots, because "[a]ny American voter living overseas can mail his or her completed ballot back to the United States *free of charge* at the nearest American embassy, consulate, or Diplomatic Post Office (DPO). If the voter has authorized access to a military base, they can mail a ballot *free of charge* at the nearest Army Post Office (APO) or Fleet Post Office (FPO)." *Id.* (emphasis added).[14]

73. As unemployment rates skyrocket in response to COVID-19's devastating impact on the economy, the burden imposed by the Postage Requirement will create obstacles to voting for the growing number of North Carolinians now facing financial hardship.

74. As of this filing, well over 1.2 million North Carolinians have already applied for unemployment insurance with the State since March 15, with a staggering number of applicants citing the COVID-19 crisis as the reason for the loss of their employment. During normal times, North Carolina typically processes around 200,000 unemployment claims per year. Without question, COVID-19-related unemployment and other collateral consequences of the public health emergency will also increase the percentage of North Carolinians living in poverty, which already exceeded 14 percent before the pandemic began.

75. But the monetary cost of stamps is not the only burden that the Postage Requirement will impose upon voters in the November election. Voters who do not already possess stamps must risk their health by either venturing out to the post office or other

[14] *See* U.S. Postal Serv., *Election Mail*, https://about.usps.com/postal-bulletin/2020/pb22539/html/cover_006.htm.

establishments that sell stamps, or by delivering their ballots in person. While there are some services that allow voters to print postage online, these services also require a printer, scale, and paid subscription.

76. And although a voter can order stamps online through the USPS website, delivery of those stamps takes five to seven days under *normal* circumstances, such stamps are not sold individually but must be purchased on a sheet of stamps that costs a minimum of $11.00, and the purchaser must pay for the shipping and handling of the stamps themselves.

77. Unless the State provides pre-paid postage for absentee ballots, both the monetary and transaction costs of submitting a ballot by mail will burden and deter voters in the upcoming election.

C. The Receipt Deadline will result in large-scale disenfranchisement for voters who must rely on USPS to deliver their ballots.

78. After a ballot has been deposited in the mail, the voter has no control over when that ballot arrives, but may nonetheless have their ballot rejected and their right to vote denied if the mail service—in most cases, USPS—fails to deliver the ballot to local election officials by the Receipt Deadline.

79. Under N.C.G.S. § 163-231(b)(1), (2), an absentee ballot is timely only if it is *received* by election officials no later than 5:00 p.m. on Election Day. If the ballot envelope is postmarked by Election Day, then the Receipt Deadline extends to 5:00 p.m. on the third day after the election.

80. In other words, whether an absentee ballot is counted in North Carolina will depend largely on the postal service's delivery timelines, which have been compromised due to the COVID-19 pandemic and large-scale restructuring of USPS.

81. As has been widely reported in the news, USPS is experiencing significant

budgetary shortfalls and personnel shortages that could severely compromise the agency's capacity to process an increasing volume of election mail.

82. The agency is also hard hit by the COVID-19 pandemic. As of July, around 5,400 postal workers across the country, including at least four in North Carolina, had tested positive for COVID-19, at least 75 had died, and more than 6,300 were self-quarantined because of prior exposure to COVID-19.

83. USPS's struggles have serious implications for North Carolina's absentee voters. Over the next few months, the USPS will be called upon to deliver an unprecedented number of absentee ballots across the country—from county election officials to voters, and then back again—yet the agency's ongoing budgetary crisis, which has already led to capacity shortages and delivery delays, means that additional cuts to routes, processing centers, or staff are likely to follow, further exacerbating the ongoing mail processing delays caused by COVID-19.

84. Depending on where in North Carolina the voter resides (for instance, rural areas often have infrequent mail pick-up times), ensuring timely delivery by the Receipt Deadline could require voters to send their ballots more than a week before the election—and even then, they still may not arrive on time.

85. Short of paying for private mail carriers or the USPS's more expensive expedited delivery options, voters who are late deciders or are otherwise unprepared to make their candidate selections and submit their votes weeks before Election Day have little assurance that the USPS will deliver their ballots on time, thus posing a significant risk of disenfranchisement.

86. While some North Carolinians opt to vote early and are prepared to choose their preferred candidates well in advance, others may not be ready to do so until much later in the election cycle. Forcing these voters to cast their ballots weeks in advance just to avoid mail

service disruptions or delays deprives them of the opportunity to participate fully in the political process and restricts their ability to consider additional or late-breaking information they may need to inform their voting choice.

87. Furthermore, voting by mail far in advance of Election Day also requires that the voter receive their absentee ballot in time to do so. Given the unprecedented number of expected absentee ballots in upcoming elections, as well as the USPS's well-documented struggles, that is far from certain.

88. The deadline to request an absentee ballot is seven days before Election Day, and voters who timely request absentee ballots may not receive them until shortly before or even after the election—a complaint common among voters during the March 3 primary. USPS has expressly warned that this seven-day window is likely insufficient for voters to complete and mail their ballots in time for delivery to election officials before state return deadlines.

89. In contrast to the deadlines placed on voters living in North Carolina and elsewhere in the country, ballots from uniformed-service and overseas voters are considered timely if they are transmitted by Election Day and received before close of business on the day before the county canvass, which cannot occur before 11:00 a.m. on the tenth day after an election. *See* N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b).

90. In addition, unlike traditional absentee ballots, uniformed-service and overseas absentee ballots, "[i]f . . . timely received, . . . may not be rejected on the basis that [they have] . . . an unreadable postmark, or no postmark." *Id.* § 163-258.12(b). But a traditional absentee ballot received by the county boards within three days after Election Day is nonetheless invalid if it lacks a legible postmark. *See id.* § 163-231(b)(2).

91. Thus, in the same election, ballots cast by uniformed-service and overseas voters

can be received and counted for an additional *six* days or more after the deadline imposed on absentee voters in North Carolina. And while the uniformed-service and overseas voter receipt deadline is tethered to the county canvass date, the earlier Receipt Deadline for stateside voters is not supported by a sufficient state interest to justify the burden it imposes on access to the franchise during the COVID-19 pandemic, particularly for those affected by delayed USPS mail service.

92. The later deadlines provided for uniformed-service and overseas absentee voters also demonstrate that the State's election apparatus is fully capable of extending the same allowances to resident North Carolinians in the midst of a public health emergency, and the State's failure to do so cannot be justified by any sufficient governmental interest.

93. In fact, the United States Supreme Court, on an application for a stay of a Wisconsin federal court injunction, recently left intact the district court remedy extending Wisconsin's receipt deadline for all mail ballots that were postmarked by Election Day. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020).

D. Signature Matching Procedures will result in the arbitrary rejection of validly-cast ballots.

94. For absentee voters whose ballots happen to be delivered before the Receipt Deadline, another hurdle awaits: arbitrary signature verification procedures. Once received, county election officials must review the sealed container envelopes of all absentee ballots to ensure that the voter signed the certification affirming their right to vote, and that the envelope is signed by a witness. *See* N.C.G.S. § 163-231.

95. Election officials may reject an absentee ballot where the voter's signature beneath the certification is missing; but in some counties, election officials further endeavor to verify whether the voter's signature on the ballot "matches" the signature of the voter on file

with the election office, a process otherwise known as "signature matching."

96. The State Board provides no guidance to county election officials engaged in signature matching, nor is it clear whether signature matching can permissibly occur under current North Carolina law. Thus, counties are left to their own devices in determining whether and how to apply Signature Matching Procedures and, ultimately, if the ballot should be counted.

97. Unsurprisingly, North Carolina counties have developed wildly inconsistent approaches to reviewing and verifying ballot signatures, with some seeming to require only the *presence* of the voter's signature, while others attempt to compare and match signatures on ballot envelopes with voter records. The counties that engage in signature matching do so without uniform standards or training, resulting in a process that varies even from one election official to the next.

98. This lack of guidance or identifiable standards is problematic because signature matching, as one federal court put it, is inherently "a questionable practice" and "may lead to unconstitutional disenfranchisement." *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018).

99. Studies conducted by experts in the field of handwriting analysis have repeatedly found that signature verification conducted without adequate standards and training is unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries.

100. Even when conducted by experts, signature matching can lead to erroneous results in the ballot verification context because handwriting can change quickly for a variety of reasons entirely unrelated to fraud, including the signer's age, medical condition, psychological state of mind, pen type, writing surface, or writing position.

101. It is, thus, inevitable that election officials will erroneously reject legitimate

ballots due to misperceived signature mismatches, which, without notice and a reasonable opportunity to cure, will result in the disenfranchisement of eligible voters. And, indeed, in jurisdictions that broadly require elections officials to engage in signature matching, thousands of lawful voters are regularly disenfranchised as a result.

102. In the November election, Signature Matching Procedures will be applied to hundreds of thousands of absentee ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice or an opportunity to cure, or that they will be forced to take additional, unnecessary steps to provide supplemental evidence—in the middle of a pandemic, no less—just to have their ballots counted.

E. Voters who need assistance to navigate barriers to absentee voting have extremely limited options.

103. Despite the significant barriers to absentee voting during the COVID-19 pandemic, many North Carolinians will not have any practical means of obtaining assistance to request or submit their absentee ballots.

104. In October 2019, the General Assembly passed the Application Assistance Ban, which imposed new restrictions on the absentee ballot application process.

105. The law states: "A request for absentee ballots is not valid if . . . [t]he completed written request is completed, partially or in whole, or signed by anyone other than the voter, or the voter's near relative or verifiable legal guardian," and requires county boards to invalidate all requests for absentee ballots that are "returned to the county board by someone other than [a near relative, verifiable legal guardian, the multi-partisan assistance team], the United States Postal Service, or a designated delivery service . . . ." SB 683, § 1.3(a) (amending N.C.G.S. § 163-

230.2(c) and (e)).[15]

106. No one else may assist voters to ensure they receive absentee ballots—even if the voter has no near relative or verifiable legal guardian nearby and no accessible multi-partisan assistance team ("MAT") member available.

107. The only exception to this prohibition is limited to voters who need assistance "due to blindness, disability, or inability to read or write" and do not have "a near relative or legal guardian available to assist." SB 683, § 1.3(a) (adding N.C.G.S. § 163-230.2(e1)).

108. The law also prohibits organizations and individuals from assisting a voter in *returning* an absentee ballot request form, stating: "The completed request form for absentee ballots shall be delivered to the county board of elections only by any of the following: (1) The voter. (2) The voter's near relative or verifiable legal guardian. (3) A member of a multipartisan team trained and authorized by the county board of elections . . . ." SB 683, § 1.3(a) (amending N.C.G.S. § 163-230.2(c)).

109. Although recent emergency legislation (HB 1169) now allows voters and a limited group of designated third parties acting on the voter's behalf (i.e., the voter's "near relative or verifiable legal guardian") to submit absentee ballot request forms online beginning in September 2020, these measures fail to address the needs of countless voters who lack the resources to take advantage of them.

110. First, over 20 percent of North Carolina households do not have internet access,

[15] A "multi-partisan assistance team" ("MAT") must consist of at least two registered voters of the county who represent the two political parties with the highest number of affiliated voters in the State, as determined by January 1 of the current year. If a MAT has more than two members, voters who are unaffiliated with a political party or affiliated with a political party different than the top two political parties in the State may be team members. To the extent there are not enough registered voters who are affiliated with the top two political parties to serve on the MAT, the county board may appoint someone who is unaffiliated with a party to serve as a team member. HB 1169 § 2.5.(a).

and over 12 percent do not have a computer. Many of these voters do not have fax machines and would be unable to fax their absentee ballot requests either, leaving them with only two options: (1) mail a completed ballot request form, requiring postage which they may not have at their disposal, and risk not having their request delivered in a timely manner, or (2) submit the form in person, assuming the voter has access to transportation, and risk exposure to COVID-19.

111. Second, any assistance voters may obtain from multipartisan assistance teams ("MATs") is limited at best. HB 1169 requires the North Carolina Department of Health and Human Services ("DHHS") and the State Board to issue guidance on the use of MATs within hospitals, clinics, nursing homes, assisted living, or other congregate living situations, but is silent on whether and how MATs will be accessible to voters who do not reside in any of the above-referenced facilities.

112. North Carolina law also imposes severe limitations on an absentee voter's ability to obtain assistance in submitting their ballot, by prohibiting anyone other than the voter's "near relative or . . . verifiable legal guardian" from "tak[ing] into possession" a voter's absentee ballot "for return to a county board of elections." N.C.G.S. § 163-226.3(a)(5).

113. Thus, voters who do not have near relatives or legal guardians available to assist them may only return an absentee ballot "by mail or by commercial courier service, at the voter's expense, or in person." *Id.* §§ 163-231(a), 163-229(b), 163-231(b).

114. The law does not even allow voters to obtain ballot delivery assistance from MATs, which are only permitted to help voters with absentee ballot requests. In fact, it is a felony for anyone other than a near relative or verifiable legal guardian to possess for delivery another voter's absentee ballot. *Id.* § 163-226.3(a)(5).

115. This leaves voters with limited, if any, reliable options for returning their ballots

without risking disenfranchisement due to mail delivery delays, incurring burdensome transaction and monetary costs, or potentially exposing themselves to health risks by submitting their ballots in person.

116. To justify these restrictions, Defendants will most likely point to the fraudulent scheme orchestrated by operatives working for Republican candidate Mark Harris's campaign in North Carolina's Ninth Congressional District race during the 2018 general election. Following an investigation, the State Board found "overwhelming evidence that a coordinated, unlawful, and substantially resourced absentee ballot scheme operated during the [election] in Bladen and Robeson Counties[,]" and was led by Harris campaign associate Leslie McCrae Dowless.[16]

117. As the Board explained, Dowless's scheme was simple and crude: he and his associates forged absentee ballot request forms, collected unsealed ballots from voters, marked the ballots to pad vote totals for Dowless's clients, and delivered the ballots to election officials by mail. Order ¶¶ 60–65. The Board determined that Dowless "frequently instructed his workers to falsely sign absentee by mail container envelopes as witnesses[.]" *Id.* ¶ 62. "In some cases, Dowless's workers fraudulently voted blank or incomplete absentee by mail ballots at Dowless's home or in his office." *Id.* ¶ 63. And Dowless's fraudulent scheme appeared to have focused on areas of Bladen and Robeson Counties where minority voters are disproportionately concentrated. *See id.* ¶¶ 47, 122, 124–25, 151.

118. Based on the State Board's finding that Dowless and his associates coordinated the widespread forgery of absentee ballot request forms and the collection of *unsealed* and *unmarked* absentee ballots, which they fraudulently marked—all actions which were already

[16] *Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District*, N. C. State Bd. of Elections, March 13, 2019 ("Order"), ¶ 19, https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf.

prohibited by existing laws criminalizing forgery—the State Board "conclude[d] unanimously that irregularities or improprieties occurred" on behalf of the Harris campaign "to such an extent that they taint[ed] the results of the entire election and cast doubt on its fairness." *Id.* ¶ 150.

119. The ban on third-party assistance in submitting absent ballot request forms or sealed absentee ballots would have done little to prevent or uncover Dowless's scheme, and the Ballot Delivery Ban was in place when the fraud occurred. Dowless and his associates forged request forms and ballots and submitted them in the mail as if they had come from the voter. In fact, Dowless's associates ensured that ballots were mailed from post offices that were geographically close to the voters' homes. Neither the Application Assistance Ban nor the Ballot Delivery Ban targets the focal point of Dowless's scheme: forgery and voter impersonation, both of which are already prohibited by State law. Dowless's actions were revealed when voters either complained about unidentified individuals picking up their ballots or voted in person after Dowless's team had attempted to submit their forged ballots.

120. The Ballot Delivery Ban further denies voters access to safe and reliable means of returning their ballots—through an assistor of their choice—and forces those who lack the resources to return their ballots in person to rely on the postal service, notwithstanding the operational difficulties that have impaired the agency's ability to meet its delivery service commitments in the upcoming election. Not only are the restrictions unnecessary to detect or prevent fraud—nor would they have been effective—but they also deprive countless North Carolinians who are especially vulnerable to the effects of COVID-19 of their right to participate in the November election.

121. Rather than simply targeting the Republican operatives' criminal conduct, the General Assembly's Application Assistance Ban significantly hindered efforts to assist voters

and mobilize communities with historically depressed turnout rates, particularly during the pandemic in which a disproportionate number of Black North Carolinians are contracting COVID-19.

CAUSES OF ACTION

COUNT I
Violation of the North Carolina Constitution
Equal Protection, Art. I, § 19
(Unconstitutional Burden on Right to Vote)

122. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

123. Article I, § 12 of the North Carolina Constitution provides in relevant part: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances."

124. Article I, § 14 of the North Carolina Constitution provides in relevant part: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained."

125. Article I, §§ 12 and 14 of the North Carolina Constitution protect the right of voters to participate in the political process, express political views, affiliate with or support a political party, and cast a vote. "Voting, like donating money to a candidate or signing a petition for a referendum, constitutes 'expressive activity' that 'express[es] [a] view' about the State's laws and policies." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *119 (N.C. Super. Sept. 03, 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020) (citation omitted).

126. Article I, § 19 of the North Carolina Constitution provides in relevant part that "[n]o person shall be denied the equal protection of the laws."

127. Collectively, these provisions prohibit the State from imposing burdens on the fundamental right to vote unless they are justified by a sufficiently important state interest.

128. North Carolinians have relied heavily on in-person voting, particularly during the early voting period, to participate in the political process. In-person voting ensures access to the franchise for those who encounter difficulty voting by mail, either due to unreliable mail service, the attendant costs—including the monetary or transactional costs of obtaining postage or securing a witness—or the accompanying risk of disenfranchisement. Moreover, for many North Carolinians, casting a ballot at a polling place will be their preferred method of exercising the franchise due to the historical significance of in-person voting.

129. The COVID-19 pandemic, however, will result in a dramatic expansion of voting by mail, which expands access to the franchise for eligible voters for whom in-person voting is difficult or impossible. For many North Carolinians, voting by mail provides the only feasible opportunity to cast a ballot without putting their health at risk.

130. The barriers to in-person and absentee voting in the November election, which will occur in the midst of a global pandemic, include: (1) limitations on the number of days and hours of early voting that counties may offer; (2) the Witness Requirement, as applied to voters residing in single person or single-adult households; (3) the monetary and transaction costs of the Postage Requirement for absentee ballots; (4) the Receipt Deadline, as applied to voters who submit their ballots by mail through USPS; (5) arbitrary and error-prone Signature Matching Procedures; and (6) restrictions preventing voters from obtaining assistance from most third parties in requesting and submitting absentee ballots. These barriers unconstitutionally burden the fundamental rights of North Carolinians to participate in our democracy, and, when taken together, the cumulative impact of these restrictions creates a severe burden on the right to vote for many eligible citizens.

131. Because the barriers to in-person and absentee voting impose severe burdens on the fundamental right to vote during the COVID-19 pandemic, and because these barriers (and the failure to implement additional safeguards to facilitate access to the franchise) cannot be justified by any sufficiently important state interest, the limitations on in-person voting and the challenged absentee voting restrictions violate the North Carolina Constitution.

COUNT II
Violation of the North Carolina Constitution's
Free Elections Clause, Art. I, § 10

132. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

133. Article I, § 10 of the North Carolina Constitution states, in its entirety, that "[a]ll elections shall be free." This provision has no counterpart in the U.S. Constitution.

134. North Carolina has strengthened the Free Elections Clause since its adoption to reinforce its principal purpose of preserving the popular sovereignty of North Carolinians. The original clause, adopted in 1776, provided that "elections of members, to serve as Representatives in the General Assembly, ought to be free." N.C. Declaration of Rights, VI (1776). Nearly a century later, North Carolina revised the clause to state that "[*a*]*ll* elections ought to be free," expanding the principle to include all elections in North Carolina. N.C. Const. art. I, § 10 (1868) (emphasis added). Another century later, North Carolina adopted the current version which provides that "[a]ll elections *shall* be free." N.C. Const. art. I, § 10 (emphasis added). As the North Carolina Supreme Court later explained, this change was intended to "make [it] clear" that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights "are commands and not mere admonitions" for proper conduct on the part of the government. *N.C. State Bar v. DuMont*, 304 N.C. 627, 639, 286 S.E.2d 89, 97 (1982) (internal quotation marks omitted).

135. "[T]he object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters." *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915). "Our government is founded on the will of the people. Their will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). "[F]air and honest elections are to prevail in this state." *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896).

136. The constitutional obligation to ensure that elections are both free and fair and reflect the will of the people, at a minimum, requires that the State ensure that all North Carolinians have a reasonable opportunity to vote—that is, not only to cast their ballots but to also have their ballots counted—without undue risk to their health and safety.

137. The State has an obligation under the Free Elections Clause to ensure that each step of the voting process, whether by mail or in person, does not unnecessarily endanger voters' health, subject voters to a significant risk of arbitrary disenfranchisement, or force voters to choose between exercising their fundamental right to vote and safeguarding their health and the health of their communities.

138. The State's failure to provide safe, accessible, and reliable means for its citizens to vote in the upcoming November election, both in person and by mail, denies Plaintiffs and all North Carolina voters the rights guaranteed to them under the Free Elections Clause. As state election officials have suggested, the COVID-19 pandemic has all but ensured that safe access to in-person voting will be severely restricted due to a significant reduction in the number of polling places and staff, and the health risks posed by packing more voters and poll workers into a small number of consolidated voting sites, for a fixed number of voting days and hours.

139. At the same time, voting by mail presents a significant risk of disenfranchisement. Absentee voters will encounter several unconstitutional barriers, when attempting to vote in the

November election (in the midst of the COVID-19 pandemic), including: (1) the Witness Requirement, as applied to voters residing in single person or single-adult households; (2) the monetary and transaction costs of the Postage Requirement for absentee ballots; (3) the Receipt Deadline, as applied to voters who submit their ballots by mail through USPS; (4) arbitrary and error-prone Signature Matching Procedures; and (5) restrictions preventing voters from obtaining assistance from most third parties in requesting and submitting absentee ballots.

140. The burdens imposed by these restrictions are exacerbated by the ongoing public health crisis and will subject voters to a significant risk of disenfranchisement in the November election for reasons outside their control.

141. The challenged barriers thus obstruct the will of North Carolinians, particularly those who—because of financial insecurity, health concerns, family care responsibilities, lack of transportation, or medical vulnerabilities—are unable to overcome the dramatically increased costs and burdens of participating in the political process during the COVID-19 pandemic. North Carolina's failure to eliminate these barriers thus violates the Free Elections Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter judgment in their favor and against Defendants, and:

a. Declare, under N.C.G.S. § 1-253, *et seq.*, that North Carolina's failure to provide sufficiently accessible in-person voting opportunities for the November election that comply with social distancing guidelines during the COVID-19 pandemic violates the Free Elections Clause, Art. I, § 10, and the Equal Protection and Law of the Land Clauses, Art. I, §§ 12, 14, and 19;

b. Declare, under N.C.G.S. § 1-253, *et seq.*, that in the context of COVID-19 pandemic and the upcoming November election, the Witness Requirement, as applied to voters residing in single person or single-adult households; the Postage Requirement and Receipt Deadline, as applied to voters who submit their ballots by mail through USPS; the Signature Matching Procedures; and the Application Assistance Ban and Ballot Delivery Ban are unconstitutional, as applied to the November election, and invalid because they violate the rights of Plaintiffs and other North Carolina voters under the Free Elections Clause, Art. I, § 10, and the Equal Protection and Law of the Land Clauses, Art. I, §§ 12, 14, and 19;

c. Require the State Board and all local election officials to expand the early voting period for the November election by an additional 21 days, and preliminarily and temporarily enjoining the enforcement of N.C.G.S. § 163-227.2(b) to the extent that it prevents the State Board or local election officials from extending early voting for an additional 21 days, or any other law that prevents the State Board or local election officials from expanding the number of early voting days;

d. Preliminarily and temporarily enjoin the Witness Requirement, as applied to voters residing in single person or single-adult households, for the November election;

e. Require the State Board to provide uniform standards and training to all election officials that use Signature Matching Procedures to verify absentee ballots;

f. Enjoin the State Board and all county boards of elections from rejecting absentee ballots through signature matching unless the State Board provides uniform

standards and training to all counties engaged in signature matching, and voters receive reasonable notice and an opportunity to cure any alleged signature defect;

g. Require the State Board and all local election officials to provide pre-paid postage for all absentee ballot request forms and absentee ballots for the November election using Qualified Business Reply Mail (QBRM), and temporarily enjoin the enforcement of N.C.G.S. § 163-231(b)(1) to the extent that it requires voters to mail their absentee ballots or applications at their own expense during the COVID-19 pandemic;

h. Require the State Board to extend the Receipt Deadline, for ballots submitted by mail through USPS by Election Day, to mirror the deadline afforded to uniformed-service and overseas absentee voters for the November election; to define the term "postmark," in connection with Plaintiffs' requested relief, to refer to any type of imprint applied by the USPS to indicate the location and date the USPS accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks; to require Defendants to ensure that absentee ballots sent to voters, and the return envelopes provided to voters for sending ballots back, include an Intelligent Mail Barcode using Intelligent Mail Full-Service to assist in ensuring that ballots mailed by Election Day are not erroneously rejected if they lack a postmark; and, where a ballot does not bear a postmark date, to require the State Board and county boards of elections to presume that the ballot was mailed on or before Election Day if it arrives within the Receipt Deadline unless the preponderance of the evidence demonstrates it was mailed after Election Day;

i. Preliminarily and temporarily enjoin the enforcement of the Application Assistance Ban and Ballot Delivery Ban, including any laws that impose criminal or other penalties for violations of the Application Assistance Ban and Ballot Delivery Ban.

j. Award Plaintiffs their costs and expenses, under applicable statutory and common law, including N.C.G.S. §§ 6-20 and 1-263; and

k. Grant Plaintiffs such other and further relief as the Court deems necessary.

Dated: August 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document by first-class mail to counsel for the defendants, intervenors, and proposed intervenors, addressed as follows:

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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, 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.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through counsel, respectfully move this Court, pursuant to North Carolina Rules of Civil Procedure 7(b) and 65, for entry of an order granting a preliminary injunction. Plaintiffs show the Court as follows:

1. This is an action for declaratory and injunctive relief to enjoin North Carolina laws that unconstitutionally burden the right to vote, and to ensure that North Carolinians have access to safe and reliable methods of voting, both in-person and by mail, during the current public health crisis caused by the novel coronavirus ("COVID-19").

2. The complaint in this action was filed on August 10, 2020 and served on all

Defendants on August 14, 2020. On August 12, Philip Berger, President Pro Tempore of the North Carolina Senate, and Timothy Moore, Speaker of the North Carolina House of Representatives, filed a Notice of Intervention. On August 18, Plaintiffs filed an Amended Complaint contemporaneously with this Motion, which has also been served on all Defendants and Intervenor-Defendants.

3. Plaintiffs seek a preliminary injunction (i) enjoining 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 November general election, and ordering 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) enjoining the enforcement of the witness requirements for absentee ballots set forth in N.C.G.S. § 163-231(a), as applied to voters residing in single person or single-adult households; (iii) enjoining the enforcement of N.C.G.S. § 163-231(b)(1) to the extent that it requires voters to pay for postage in order to mail their absentee ballots, and ordering Defendants to provide postage for absentee ballots submitted by mail in the November election; (iv) ordering Defendants to provide uniform guidance and training for election officials engaged 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; (v) enjoining the enforcement of N.C.G.S. §§ 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; (vi) enjoining the enforcement of N.C.G.S § 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.

4. Plaintiffs are likely to succeed in demonstrating that the barriers to voting by mail and in-person in the November election violate the Free Elections Clause, Art. I, § 10, and the Equal Protection and Law of the Land Clauses of the North Carolina Constitution, Art. I, §§ 12, 14 and 19. First, the ballot receipt deadline, as USPS has recognized, is incompatible with postal delivery standards. In light of mail delivery delays caused by the COVID-19 pandemic and the recent operational changes within the Postal Service, enforcement of the receipt deadline will result in the disenfranchisement of eligible voters who request and mail their ballots in accordance with State law. Second, the witness requirement forces voters, particularly those in single-adult households, to risk their health in order to vote by mail. Third, the postage requirement forces voters to incur monetary and transaction costs that far exceed the price of a stamp and unduly burden voters who do not have ready access to postage. Fourth, the absence of any uniform guidance or training in signature comparison has resulted in a patchwork of error-prone, signature matching practices that significantly burden, and in many cases disenfranchise, voters arbitrarily. Fifth, polling places draw large numbers of individuals within enclosed spaces. In light of the current barriers to voting by mail, the inevitable reduction in early voting sites and hours due to the COVID-19 pandemic, and the resulting risk of daily congestion, the in-person voting options for the November election create public health risks that unduly burden and deter North Carolinians from exercising their constitutional right to vote.

5. Finally, notwithstanding the risks of in-person voting and the barriers to voting by mail, North Carolina law also denies voters the option to seek assistance from individuals or organizations of the choice, with few limited exceptions, to submit their absentee ballots or to fill out and submit their absentee ballot applications.

6. These barriers to the franchise individually and cumulatively impose severe burdens on the right to vote and deny voters access to a free and fair election, particularly when applied in a general election held during the COVID-19 pandemic. And these burdens cannot be justified by any countervailing State interest.

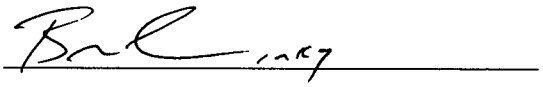
7. Absent injunctive relief, Plaintiffs will suffer irreparable harm from the violation of their constitutional right to vote and to participate in a free and fair election, as well as the unconstitutional burdens imposed by the added costs and risk of exposure to COVID-19 created by the State's current voting procedures—even for those who manage to cast an effective ballot.

8. Finally, the equities weigh in Plaintiffs' favor. Plaintiffs, along with all eligible North Carolina voters, have a strong interest in safely exercising their constitutional right to vote. All North Carolinians are entitled to an electoral process that truly ascertains the will of the people. The State has no interest in holding an election under laws and practices that fall short of these constitutional mandates.

WHEREFORE Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.

Dated: August 18, 2020

Respectfully submitted,

By: 

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I certify that I served the foregoing document by first-class mail to counsel for the defendants, intervenors, and proposed intervenors, addressed as follows:

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This the 18th day of August, 2020.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, STATE OF CALIFORNIA, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF MAINE, COMMONWEALTH OF MASSACHUSETTS, and STATE OF NORTH CAROLINA, Plaintiffs, v. LOUIS DEJOY, *in his official capacity as United States Postmaster General*; ROBERT M. DUNCAN, *in his official capacity as Chairman of the Postal Service Board of Governors*; and the UNITED STATES POSTAL SERVICE, Defendants.	**No. 2:20-cv-4096**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This lawsuit challenges Defendants' unlawful actions designed to undermine the effective operation of the United States Postal Service ("USPS" or "Postal Service") and impede the efforts of the Plaintiff States to conduct free and fair elections in the manner Plaintiff States have chosen. The Plaintiff States bring this action to remedy the harm caused by Defendants' actions and to protect their constitutional authority to conduct their elections in the manner their respective legislatures have chosen.

2. Specifically, the States challenge several of USPS's recent operational and policy changes, some implemented by USPS for the stated purpose of reducing the agency's operating costs, but which have led to significant delays in mail delivery across the country.

3. These changes—which include prohibiting late or extra trips by postal workers that are often necessary to keep the mail moving forward in the mailstream; requiring carriers to

adhere rigidly to start and stop times regardless of whether all mail for their route has arrived or been delivered; and limiting the use of overtime—were made without due regard to their likely impact on mail service and in violation of the procedural requirements of the Postal Reorganization Act.

4. These policy changes also are inconsistent with the Postal Service's longstanding practice: Keep every piece of mail moving each day toward its final destination and deliver every piece of mail ready for delivery.

5. These changes were made despite the ongoing COVID-19 pandemic, which has imposed significant and unanticipated burdens that make it more challenging for the Postal Service to meets its objective. Postal employees, as essential workers, remain at increased risk of contracting the virus; indeed, nearly 10 percent of the 630,000 postal workers nationwide have contracted it as of August 2020.[1] Increased rates of absence due to illness and the need to quarantine workers who may have been exposed require other postal workers to work additional hours, making the limitation of overtime and the Postal Service's other policy changes particularly ill-advised.

6. What is more, USPS has implemented these unlawful policy changes just months before the November 3, 2020, general election. In this election, far more Americans will cast their ballots by mail than have ever done so before. In 28 states—including Plaintiff Commonwealth of Pennsylvania, Plaintiff State of Delaware, Plaintiff State of Maine, Plaintiff Commonwealth of Massachusetts, and Plaintiff State of North Carolina—voters will be able to apply for and cast a mail-in ballot for any reason. Voters in six other states will be able to invoke

[1] Jason Knowles and Ann Pistone, *USPS workers concerned agency isn't doing enough to protect essential workers from COVID-19*, ABC7 Chicago (Aug. 14, 2020), https://abc7chicago.com/usps-covid-illinois-postal-service/6360074/

the COVID-19 pandemic to vote by mail. Plaintiff District of Columbia and nine additional states—including Plaintiff State of California—will send mail-in ballots to every eligible voter. And in seven other states, voters may request a mail-in ballot if they will not be able to vote in person on the day of the election.

7. Many of these states are already seeing record numbers of mail-in ballot requests. As of this week, North Carolina has received more than 10.8 times the number of absentee ballot requests than the state had at the same time in 2016.

8. Many states have only recently expanded their use of mail-in ballots. In California and the District of Columbia, for the first time, all registered active voters will automatically be sent a mail-in ballot for the November 2020 general election. In Pennsylvania and Delaware, all voters were given the option of voting by mail for the first time in the 2020 primary election. In that election, the number of mail-in votes in Pennsylvania was nearly eighteen times what it had been in 2016.

9. While mail-in ballots are a convenience for some voters, they are a necessity for others. For voters with disabilities or those who are unable to get to the polls, casting a mail-in ballot may be the only realistic means of voting. Furthermore, given the strong likelihood that the COVID-19 pandemic will not have abated by November, in-person voting will present an increased risk of infection. This risk is only exacerbated for elderly voters and others who are particularly vulnerable to the illness. For such voters, the ability to cast a ballot by mail is essential.

10. Despite the many benefits of mail-in voting—and the necessity of relying on mail-in voting during the current health crisis—President Trump has repeatedly sought to undermine confidence in voting by mail, falsely asserting that mail-in votes are subject to

widespread fraud. In fact, the States take numerous steps to protect against fraud, through techniques such as matching signatures, requiring witnesses, and providing each voter with an individually identified return envelope in which to place the voter's sealed ballot.

11. Contrary to President Trump's claims, there is no evidence that mail-in ballots contribute to fraud.

12. President Trump's attacks on mail-in voting have only escalated recently, as he has stated that he opposes providing USPS with additional funding because he believes that, without such funding, "USPS will not be able to have universal mail-in voting because they're not equipped to have it."

JURISDICTION AND VENUE

13. This action arises under the Postal Reorganization Act, 39 U.S.C. § 3661, and the United States Constitution. This Court has subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1339, and 39 U.S.C. § 409.

14. In addition, this Court has the authority to issue the declaratory relief sought pursuant to 28 U.S.C. § 2201.

15. Venue is proper in this Court because Plaintiff Commonwealth of Pennsylvania resides in this district and because a substantial part of the events giving rise to this action occurred in this district. *See* 28 U.S.C. § 1391(e)(1).

THE PARTIES

16. Plaintiff Commonwealth of Pennsylvania is a sovereign state of the United States of America. This action is brought on behalf of the Commonwealth by Attorney General Josh Shapiro, the "chief law officer of the Commonwealth." Pa. Const. art. IV, § 4.1.

17. Plaintiff State of California is a sovereign state of the United States of America. This action is brought on behalf of the State of California by Attorney General Xavier Becerra, the "chief law officer of the State." Cal. Const. art. V, § 13.

18. Plaintiff State of Delaware is a sovereign state of the United States of America. This action is brought on behalf of the State of Delaware by Attorney General Kathleen Jennings as the "chief law officer of the State," charged with protecting public rights and enforcing public duties in court. *Darling Apartment Co. v. Springer*, 22 A.2d 397, 403 (Del. 1941). Attorney General Jennings also brings this action on behalf of the State of Delaware pursuant to her statutory authority to represent the State and its instrumentalities in all legal proceedings. Del. Code Ann. tit. 29, § 2504.

19. Plaintiff the District of Columbia (the "District") is a sovereign municipal corporation organized under the Constitution of the United States. It is empowered to sue and be sued, and it is the local government for the territory constituting the permanent seat of the federal government. The District is represented by and through its chief legal officer, the Attorney General for the District of Columbia, Karl A. Racine. The Attorney General has general charge and conduct of all legal business of the District and all suits initiated by and against the District and is responsible for upholding the public interest.

20. Plaintiff State of Maine is a sovereign state of the United States of America. This action is brought by and through the State of Maine's Attorney General, Aaron M. Frey. The Attorney General of Maine is a constitutional officer with the authority to represent the State of Maine in all matters and serves as its chief legal officer with general charge, supervision, and direction of the State's legal business. Me. Const. art. IX, Sec. 11; Me. Rev. Stat. tit. 5, §§ 191 *et seq.* The Attorney General's powers and duties include acting on behalf of the State and the

people of Maine in the federal courts on matters of public interest. The Attorney General has the authority to file suit to challenge action by the federal government that threatens the public interest and welfare of Maine residents as a matter of constitutional, statutory, and common law authority.

21. Plaintiff Commonwealth of Massachusetts is a sovereign state of the United States of America. Massachusetts is represented by its Attorney General, Maura Healey. Attorney General Healey is the chief law enforcement officer in Massachusetts and has both statutory and common-law authority to bring lawsuits to protect the interests of the Commonwealth of Massachusetts and the public interest of the people. *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1265-66 (Mass. 1977); Mass. Gen. Laws ch. 12, §§ 3, 10.

22. Plaintiff State of North Carolina is a sovereign state of the United States of America. North Carolina is represented by its Attorney General, Joshua H. Stein, who is the chief law enforcement officer of the State. The Attorney General brings this lawsuit under his constitutional, statutory, and common-law authority.

23. Defendant Louis DeJoy is the United States Postmaster General and is sued in his official capacity. His principal address is 475 L'Enfant Plaza S.W., Washington, D.C. 20260.

24. Defendant Robert M. Duncan is the Chairman of the Postal Service Board of Governors and is sued in his official capacity. His principal address is 475 L'Enfant Plaza S.W., Washington, D.C. 20260.

25. Defendant United States Postal Service is "an independent establishment of the executive branch" of the U.S. government. 39 U.S.C. § 201. Its principal address is 475 L'Enfant Plaza S.W., Washington, D.C. 20260. Congress has waived the Postal Service's immunity from suit. 39 U.S.C. § 401.

BACKGROUND

I. Elections in the United States

26. The Constitution invests the States with primary authority for regulating elections for federal office.

27. Under the Elections Clause, each State's legislature shall prescribe "The Times, Places and Manner of holding Elections for Senators and Representatives" to represent that State. U.S. Const., art. I, § 4, cl. 1. That clause further provides that Congress—and only Congress—"may at any time by law make or alter such regulations." *Id.*

28. The exercise of State power under the Elections Clause is necessary for elections "to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Consequently, "States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Id.*

29. Each State also possesses the constitutional prerogative, under the Electors Clause, to "appoint" presidential electors "in such Manner as the Legislature thereof may direct." U.S. Const. art. II § 1, cl. 2. The Electors Clause "'convey[s] the broadest power of determination' over who becomes an elector" to the States. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020) (quoting *McPherson v. Blacker*, 146 U.S. 1, 27 (1892)).

30. The 26th Amendment further guarantees that the "right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI.

II. Voting in the Plaintiff States

Pennsylvania

31. For several decades, Pennsylvania has allowed for absentee voting by, among others, individuals serving in the military and anyone who would be away from his or her polling place on Election Day for business or occupational reasons. 25 Pa. Stat. § 3146.1.

32. In October 2019, Pennsylvania enacted Act 77, the most significant change to the Commonwealth's elections code in more than 80 years. *See* Act of October 31, 2019, P.L. 552 No. 77 (Act 77). Among other reforms, Act 77 gave Pennsylvanians more time to register to vote; instituted no-excuse mail-in voting for all Pennsylvania voters; extended mail-in and absentee submission deadlines; allowed Pennsylvanians to request placement on a permanent mail-in or absentee ballot list for all elections held in a calendar year; and provided funding for local election board to implement more secure voting procedures, including machines with a voter-verifiable paper ballot.

33. Act 77 took effect for the 2020 primary election and will govern the November 2020 general election in Pennsylvania. As a result, any registered Pennsylvania voter is entitled to vote by an official mail-in ballot in the 2020 election. 25 Pa. Stat. § 3150.11.

34. The deadline to register to vote in Pennsylvania is 15 days before the election. 25 Pa. Stat. § 3071. For the November 2020 general election, this deadline is October 19, 2020.

35. Voters apply for a mail-in or absentee ballot by mailing or hand-delivering a paper form to the county board of elections. 25 Pa. Stat. § 3150.12(f); 25 Pa. Stat. § 3146.2. Voters with qualifying state identification can also submit an application for a mail-in or

absentee ballot entirely online. 25 Pa. Stat. § 3150.12(f); 25 Pa. Stat. § 3146.2(k); Pa. Dep't of State, *Ballot Request Application*.[2]

36. Applications for mail-in and absentee ballots must be submitted one week before the election and received by county board of elections "not later than five o'clock P.M. of the first Tuesday prior to the day of" any election. 25 Pa. Stat. § 3150.12a(a); 25 Pa. Stat. § 3146.2a(a). For the November 2020 general election, the deadline to apply for a mail-in or absentee ballot is 5 p.m. on Tuesday, October 27.

37. Voters who satisfy an exception, such as voters with a disability or who were unable to apply for business or occupational reasons, may apply for an absentee ballot until polls have closed. 25 Pa. Stat. § 3146.2a.

38. Beginning 50 days before the election, the county board of elections must begin mailing mail-in and absentee ballots as soon as the ballot is certified and the ballots are available. 25 Pa. Stat. §§ 3150.12a(a), 3150.15; 25 Pa. Stat. §§ 3146.2a(a), 3146.5(b)(1). Once delivery of mail-in and absentee ballots has begun, the county board of elections must mail or deliver mail-in and absentee ballots to voters within 48 hours of receiving and approving an application for a mail-in ballot. 25 Pa. Stat. § 3150.15; 25 Pa. Stat. § 3146.5(b)(1). Because applications can be submitted until a week before the election, the latest a Pennsylvania county board can mail a ballot for the November 2020 general election is Thursday, October 29.

39. Act 77 provides that, except for overseas military ballots, mail-in and absentee ballots will be counted only if they are received by the county board of elections by 8 p.m. on the day of the election. 25 Pa. Stat. §§ 3150.16; 3511; 25 Pa. Stat. § 3146.6. Voters must mail the

[2] https://www.pavoterservices.pa.gov/OnlineAbsenteeApplication/#/OnlineAbsenteeBegin.

completed ballot or deliver it in person to the county board of elections. 25 Pa. Stat. § 3150.16; 25 Pa. Stat. § 3146.6.

40. In response to the COVID-19 pandemic and the significant increase in mail-in voting applications, Pennsylvania will provide funding to allow counties to send a postage-paid ballot-return envelope with each ballot for the November 2020 general election. The Pennsylvania Department of State is working with individual counties to identify the easiest manner of implementing pre-paid postage for November's returned ballots—whether it be reimbursed metered postage, funding Business Reply Mail postage costs, or reimbursement for stamps.

41. Pennsylvania voters at any time can request to be placed on a permanent mail-in or absentee ballot list. 25 Pa. Stat. § 3150.12(g); 25 Pa. Stat. § 3146.2(e.1). Voters on this list will receive a mail-in or absentee ballot application every year. If the voter completes the application and requests to receive a mail-in or absentee ballot for all other elections during that calendar year, then the voter will automatically receive a mail-in or absentee ballot for the remainder of the calendar year. More than 1.1 million Pennsylvania voters signed up for the permanent mail-in ballot list for elections in calendar year 2020.

42. On June 2, 2020, Pennsylvania conducted its first election under Act 77. "Nearly 1.5 million voters cast their vote by mail-in or absentee ballot, 17 times the number that voted absentee in the 2016 primary, when approximately 84,000 absentee ballots were cast." Pa. Dep't of State, *Pennsylvania 2020 Primary Election Act 35 of 2020 Report* 4 (Aug. 1, 2020) ("2020 Report").[3] The 2020 Report explained that four "unprecedented conditions" occurred for the 2020 primary: (1) all 67 counties implemented new voting systems with a voter-verifiable paper

[3] https://www.dos.pa.gov/VotingElections/Documents/2020-08-01-Act35Report.pdf

ballot; (2) the expansion of mail-in voting to all eligible voters; (3) the COVID-19 global pandemic; and (4) civil unrest in response to the death of George Floyd, leading to curfews, travel restrictions, and office closures. *Id.* at 4. Nearly 1.5 million Pennsylvanians voted by mail and more than 1.3 million voted in person, resulting in "overall turnout . . . far higher than in 2012," the last election in which a presidential primary was not contested in either party. *Id.* The ability to cast a mail-in ballot was particularly important in larger counties where hundreds of poll sites were consolidated for reasons related to COVID-19 and civil unrest. *See id.* at 31-32 (Allegheny consolidated 830 polling places into 211; Delaware consolidated 151; Montgomery consolidated 212; and Philadelphia consolidated 850 into 190).[4]

43. Older individuals, those 65 and over, make up 18.7 percent of Pennsylvania's population, compared to 14.9 percent nationally.

44. As of August 17, 2020, more than 8.67 million Pennsylvanians have registered to vote. Of these, more than 1.68 million voters have requested a mail-in or absentee ballot for the November 2020 general election and more than 1.34 million voters have been approved. By comparison, only 356,300 absentee ballot requests were approved for the 2008 general election; 311,477 for the 2012 general election; and 322,467 for the 2016 general election.

California

45. California has a decades-long history of safely and securely administering mail-in elections. California began tracking the use of absentee mail-in voting in 1962, and it has allowed absentee mail-in voting for any registered voter, for any reason, since 1979.

[4] *See also, e.g.*, Julian Routh, *County announces consolidated voting places for June 2 Pa. primary*, Pittsburgh Post-Gazette (May 15, 2020), https://www.post-gazette.com/news/vote2020/2020/05/15/allehgeny-County-announces-consolidated-voting-places-for-June-2-Pa-primary/stories/202005150141.

46. In June 2020, in response to COVID-19, the California Legislature enacted, and Governor Gavin Newsom signed, Assembly Bill 860, which requires that all active registered voters in California receive a vote-by-mail ballot in the mail prior to the November 2020 general election. 2020 Cal. Stat. ch. 4 (AB 860).

47. For the November 2020 general election, the California elections officials shall, no later than 29 days before the day of the election, begin mailing ballots and required election materials to every active registered voter in each county. The county elections official shall have five days to mail a ballot to each person who is registered to vote on the 29th day before the day of the election and five days to mail a ballot to each person who is subsequently registered to vote. Cal. Elec. Code § 3000.5. This must include a ballot, and all supplies necessary for the use and return of the ballot, including an identification envelope with prepaid postage for the return of the vote by mail ballot. Cal. Elec. Code § 3010.

48. California voters may return completed ballots by mail (with postage prepaid by the State); by returning the ballot in person to a polling place, vote center or early voting location, or office of county elections official; by dropping the ballot into one of the county's ballot drop boxes; or authorizing someone to return the ballot on the voter's behalf. Cal. Elec. Code § 3017, subds. (a), (b). The State accepts completed ballots that are postmarked no later than Election Day or received by other means no later than the time the polls close on Election Day. Cal. Elec. Code § 3020.

49. County election officials must examine the postmark on the return envelope and signature on the declaration before processing the ballot. Signatures are also reviewed to ensure that a voter's signature on the ballot declaration matches the signature of that voter in the registration files. Cal. Elec. Code §§ 3020, 3019.

50. County election officials may begin to process vote by mail ballot return envelopes beginning 29 days before the election. Processing vote by mail ballot return envelopes may include verifying the voter's signature on the vote by mail ballot return envelope pursuant to Section 3019 and updating voter history records. Cal. Elec. Code § 15101(a). For the statewide general election to be held on November 3, 2020, any jurisdiction having the necessary computer capability may start to process vote by mail ballots on the 29th day before the election. Processing vote by mail ballots includes opening vote by mail ballot return envelopes, removing ballots, duplicating any damaged ballots, and preparing the ballots to be machine read, or machine reading them, including processing write-in votes so that they can be tallied by the machine. However, under no circumstances may a vote count be accessed or released until 8 p.m. on the day of the election. All other jurisdictions shall start to process vote by mail ballots at 5 p.m. on the day before the election. Cal. Elec. Code § 15101(b)(2). Results of any vote by mail ballot tabulation or count shall not be released before the close of the polls on the day of the election. Cal. Elec. Code § 15101(c).

51. For the November 2020 general election, county election officials must accept as timely cast any ballot received by the voter's elections official via USPS or a bona fide private mail delivery company by the 17th day after Election Day as long as the ballot is either (1) postmarked on or before election day, is time stamped or date stamped by a bona fide private mail delivery company on or before election day or it is otherwise indicated by USPS or a bona fide private mail delivery company that the ballot was mailed on or before election day; or (2) if the ballot has no postmark, a postmark with no date, or an illegible postmark, and no other information is available from USPS or the bona fide private mail delivery company to indicate the date on which the ballot was mailed, the vote by mail ballot identification envelope is date

stamped by the elections official upon receipt of the vote by mail ballot from USPS or a bona fide private mail delivery company, and is signed and dated prior to or on Election Day. Cal. Elec. Code § 3020(d).[5]

52. For prior elections, California has paid USPS Marketing Mail rate for distributed ballots and Business Reply Mail rate (First-Class equivalent) for returned ballots.

53. For elections other than the November 2020 general election, voters can request to be placed in permanent vote-by-mail status. Cal. Elec. Code. § 3000, *et seq*. Voters can complete a one-time application through their elections office online or by mail. Voters who complete the application to become a permanent vote-by-mail voter will automatically receive a mail-in ballot for all subsequent elections. A voter's permanent vote-by-mail status will end if the voter cancels their status or if the voter does not vote in four consecutive statewide general elections. As of filing, 14.4 million California voters are currently on the permanent mail-in ballot list.

54. Between tracking of individual ballots, verification of individual signatures, and other safeguards, California's vote-by-mail system has proven to be secure and, historically, there is no evidence of significant levels of voter fraud related to vote-by-mail ballots in California.

[5] For purposes of this section, "bona fide private mail delivery company" means a courier service that is in the regular business of accepting a mail item, package, or parcel for the purpose of delivery to a person or entity whose address is specified on the item. Cal. Elec. Code § 3020(c). Notably, about 3,000 routes in California are only covered by rural carriers, meaning that residents along these routes heavily rely on USPS to send and receive mail. Erika D. Smith, *Column:Trump is so dumb trying to sabotage USPS, Democrats. He's hurting his own voters*, L.A.Times (Aug. 14, 2020), https://www.latimes.com/california/story/2020-08-14/trump-usps-fight-hurts-voters-before-november-election.

55. California's vote-by-mail system is widely and increasingly used by California voters. In the 2020 primary election, over 9.6 million ballots were cast, considerably above the 7.1 million ballots cast for the most recent similar election, the 2018 primary election. And the percentage of total ballots cast by voting by mail increased as well, from 67.7 percent of the total ballots cast in the 2018 primary election to 72.08 percent of the total ballots cast in the 2020 primary election.

56. California's expansive vote-by-mail system allowed the state to run elections during the COVID-19 pandemic without the danger of voters congregating at overcrowded polling stations. In two special elections held in May 2020 , in which all active status, registered voters in those districts were automatically sent mail-in ballots, voter participation remained about the same or increased compared to the March 3, 2020, primary, in which mail-in ballots were not automatically sent to all active voters, except in Los Angeles County. In California's 25th Congressional District, there was 41.06 percent voter participation in the May special election, an increase from 38.95 percent voter participation in the March primary. In California's 28th State Senate District, there was 38.95 percent voter participation in the May special election, compared to 44.84 percent in the March primary.

57. Approximately 14.8 percent of California's population is aged 65 years or older.

58. As of filing, 20.9 million active California voters will automatically be receiving a mail-in ballot for the November 2020 general election.

Delaware

59. Delaware has allowed absentee voting for decades. Article V, § 4A of the Delaware Constitution directs the Delaware General Assembly to enact laws allowing for absentee voting for certain specified categories of individuals. Today, Delaware law allows qualified, registered voters who are unable to appear at their polling place to vote absentee if,

among other listed reasons, they are sick, physically disabled, absent from the State due to public or military service, or because they are living abroad or on vacation. Del. Code Ann. tit. 15, § 5502. Delaware subsequently permitted some of these classes of individuals to obtain permanent absentee status and receive an absentee ballot for every election. Del. Code Ann. tit. 15, § 5503(k).

60. Absentee voting eligibility for Delaware's 2020 presidential primary was expanded due to the COVID-19 pandemic through an executive order issued by Delaware Governor John C. Carney, Jr., which allowed any otherwise duly-registered voter to vote by absentee ballot using the "sick or physically disabled" qualification under Delaware law if the individual was abiding by Centers for Disease Control & Prevention and Delaware Division of Public Health guidelines by exercising self-quarantine or social distancing to avoid potential exposure to (and community spread of) COVID-19. *See* Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Mar. 24, 2020).[6] More than 56,000 individuals utilized this expanded absentee voting eligibility to cast an absentee ballot for the 2020 presidential primary, compared to 5,046 individuals who voted by absentee ballot for the 2016 presidential primary.

61. On July 1, 2020, Delaware enacted legislation to allow any registered voter to vote by mail-in ballot for the non-presidential primary election scheduled for September 15, 2020, the general election on November 3, 2020, and any special election to be called in 2020 due to a vacancy in a statewide office, the Delaware General Assembly, or an office of United States Representative, Senator, or Presidential Elector. Del. Code Ann. tit. 15, § 5601.

[6] http://governor.delaware.gov/health-soe/sixth-state-of-emergency/.

62. Under the new mail-in voting law, the State Election Commissioner is required to send an application to receive a mail-in ballot to every qualified, registered voter no less than 60 days before an applicable election. Del. Code Ann. tit. 15, § 5603(a). For each registered voter who requests a mail-in ballot, the Delaware Department of Elections must send that voter a mail-in ballot, instructions for completing the ballot, and a postage-paid envelope marked "BALLOT ENVELOPE" to return it. Del. Code Ann. tit. 15, § 5604(b). These materials must be sent to the requesting registered voter not more than 30 days nor less than 4 days prior to the applicable election, and within 3 days of the materials becoming available to the Department of Elections. *Id.* As a matter of practice, the Department of Elections sends outbound election materials by First-Class Mail, except for the mail-in voting application, which is sent Business Reply Mail. The postage-paid ballot envelopes sent to voters are marked First-Class.

63. Delaware voters may return completed ballots to the Department of Elections in one of three ways: depositing the ballot envelope in a United States postal mailbox; delivering the ballot envelope to the Department of Elections; or placing the ballot envelope in a secure drop-box located in a publicly accessible portion of a Department of Elections office either before or on the day of election. Del. Code Ann. tit. 15, § 5607(a)(4). In each case, the Department of Elections must receive a mail-in ballot before the polls close on the day of election in order for it to be counted. Del. Code Ann. tit. 15, § 5608.

64. Approximately 19.4 percent of Delaware residents, and 24.2 percent of all registered Delaware voters, are 65 years of age or older.

65. As of filing, 727,968 Delaware voters have registered to vote. Of these, 81,677 voters have requested an absentee or mail-in ballot for the November 2020 general election.

66. As of filing, 24,552 Delaware voters are on the permanent absentee ballot list.

District of Columbia

67. In the District of Columbia, voters may cast an absentee ballot via mail without an excuse, or cast a ballot in person during early voting or on Election Day.

68. Ballots cast by mail must be postmarked or otherwise demonstrated to have been sent on or before Election Day and must arrive no later than the tenth day after Election Day.

69. Due to the COVID-19 pandemic, the District of Columbia Board of Elections (DCBOE) encouraged voters to cast their ballots by mail for the June 2, 2020, primary election. For that election, all active registered voters received an absentee ballot application and a postage-paid return envelope. D.C. Code § 1-1001.05(a)(9A).

70. Tens of thousands of voters submitted that application and participated in the election via mail-in ballot. Of the nearly 115,000 ballots cast in that election, 67 percent were cast by mail. By comparison, in the 2016 primary, just 5.5 percent of ballots were cast by mail.

71. To protect the public and election workers, DCBOE is strongly encouraging voters to vote by mail for the November 2020 general election. For that election, all active registered voters will receive an absentee ballot and a postage-paid return envelope at their registered address or mailing address. D.C. Code § 1-1001.05(a)(9A-i). Voters will not be required to request a mail-in ballot.

72. Due to COVID-19, and in comparison to previous presidential elections, there will be diminished availability to cast a ballot early in person or in person on Election Day. For example, while there were 143 Election Day precinct-based polling places for the November 8, 2016 election, there will be just 89 Election Day Vote Centers on November 3, 2020.

73. As of 2019, 12.4 percent of District residents were age 65 or older.

74. As of July 31, 2020, there were 503,093 registered voters in the District of Columbia.

Maine

75. Before 1999, Maine voters could vote absentee when the voter was unable to cast a ballot due to: absence from the municipality during the time the polls are open on election day; physical incapacity; confinement in a penal institution; or unreasonable distance from the polls, if the voter is a resident of a township, coastal island ward or district. Me. Rev. Stat. Ann. Tit. 21-A § 751 (1999). Since 1999, Maine voters also have been able to vote absentee with no excuse. Me. Rev. Stat. Ann. Tit. 21-A § 751 (2020).

76. To vote absentee, a voter must request a ballot. A request for a no excuse absentee ballot must be made no later than 5 p.m. on the Thursday before Election Day, which is October 29, 2020, for the upcoming election. Voters can still obtain an absentee ballot after that deadline if they can invoke one of the reasons listed in Me. Rev. Stat. Ann. Tit. 21-A § 753-B(2)(D) (2020).

77. Voters may choose between three methods of absentee voting: voters may mail their completed ballot to the municipal office for the municipality where they are registered to vote; voters may carry their completed ballot to that same municipal office, or have a family member or authorized third person do so; and voters may complete their ballot prior to Election Day in the presence of the clerk in their municipality.

78. With an exception for communities with fewer than 100 residents, absentee ballots must be received in the municipal office before 8 p.m. on Election Day to be counted. Me. Rev. Stat. Ann. Tit. 21-A §§ 626(2), 755 (2020).

79. The need for an effective vote-by-mail option is critical in Maine because the electorate includes relatively high levels of individuals unable to vote in person and individuals at risk of severe illness from COVID-19, particularly disabled and elderly voters.

80. Maine has among the highest rates of disability in the nation: According to the Maine Center for Disease Control, 22.1 percent of adults in Maine have some form of disability. Disabled Mainers vote at extremely high rates. In the November 2016 election, for example, 70.2 percent of disabled Mainers voted, the third-highest figure in the country.

81. Additionally, certain conditions which can result in disability, such as obesity and cancer, place individuals at an increased risk of severe illness from COVID-19. Maine has the highest obesity rate in New England, as well as the ninth-highest cancer rate in the country. According to the Maine Center for Disease Control, about half of Maine adults over the age of 18 are at risk of serious illness from COVID-19 due to age and pre-existing medical conditions.

82. Moreover, Maine is the oldest state in the nation. As of July 2019, approximately 21 percent of the population was over 65 years old. Older voters are also disproportionately represented in the Maine electorate. Of the approximately 693,000 Mainers who voted in the November 2018 election, more than a third were over the age of 65 (approximately 273,000 voters, or 79 percent of potential voters in that age group). Maine's older voters are particularly susceptible to harm from COVID-19. Over 27 percent of COVID-19 cases identified in Maine are among Mainers aged 60 or older.

83. Voting by mail is especially beneficial for Maine voters who are homebound, such as the elderly and members of the disabled community; those who are economically disadvantaged and have limited access to transportation and childcare that would enable them to vote in person during a set timeframe; overseas and military voters; those who are temporarily

away from home for work or family reasons; those who provide care for individuals must vulnerable to COVID-19; and those who may not have time to get to the polls during set hours, such as shift workers, caregivers, single parents, and those without childcare or time off from work.

84. Maine's most recent primary, held on July 14, 2020, shows the importance of allowing voters to vote by mail. The percentage of ballots voted by mail increased significantly over prior years. Historically, the rate at which Maine voters voted by mail has been lower than 10 percent in general elections and less than 3 percent in primaries. Based upon final figures for the July 2020 primary, there were 111,139 ballots cast by mail, which equates to about 35 percent of ballots cast. This represents at least a 10 fold increase over primaries in the last four election cycles.

85. As of August 3, 2020, there are 1,063,383 residents are registered to vote. Between August 17, 2020 (when it was launched) and August 20, 2020, 45,976 voters have applied for an absentee or mail-in ballot through the online ballot request service, more than the total for the 2016 general election.

Massachusetts

86. Massachusetts has a long history of safely and securely accepting absentee ballots by mail. *See* Mass. Gen. Laws ch. 54, §§ 89-100. In 2014, Massachusetts law was changed to allow "early voting" for biennial state elections only, beginning with the 2016 election. The law provided for early voting in person or by mail, but only during the early voting period, which was limited to 10 days before the election. *See* Mass. Gen. Laws ch. 54, § 25B. The two systems (absentee voting and early voting) overlap in several ways, but the most important difference is that the state constitution requires that absentee voters must have an excuse (for example, a voter

can vote absentee if he is away from his city or town on Election Day), *see* Mass. Const. amend. art. CV, but no excuse is needed in order to vote early.

87. In 2020, in response to the ongoing COVID-19 pandemic, Massachusetts expanded its early voting program to permit voters to vote by mail without an excuse for an extended period of time over the previous law. Every registered voter is now eligible to vote early by mail in Massachusetts this year. A registered voter need only complete a timely application for a mail-in ballot to vote by mail this year in the State Primary or the State Election. *See* Mass. Stat. 2020, ch. 115, § 6

88. The deadline to register to vote in the State Primary (to be held on September 1, 2020) is August 22. The deadline to register to vote in the State Election (to be held on November 3, 2020) is October 24. Mass. Stat. 2020, ch. 115, § 18. A voter can register online, by mail, or in person at any city or town hall in Massachusetts. *See* Mass. Gen. Laws ch. 51, §§ 3, 26

89. In order to vote by mail, a registered voter must send a signed application for a mail-in ballot to a local election office. The voter will then be mailed a ballot to vote and return. *See* Mass. Stat. 2020, ch. 115, § 6

90. In order to make a timely request for a mail-in ballot, the voter's application for a ballot must be received by local election officials at least 4 business days before the relevant election. Local election officials mail ballots to voters as soon as they are available; this year, state law requires that ballots be made available to local election officials for the State Election no later than October 5, 2020. *See* Mass. Stat. 2020, ch. 115, § 6.

91. Each voter that makes a timely request for a mail-in ballot will receive a ballot, instructions, a security envelope in which to conceal the ballot after voting which contains an

affidavit that the voter must sign, and a larger envelope in which to return the security envelope. Once a voter receives a mail-in ballot, it can be completed and returned to local election officials either by mail or, where available, to a secure drop box. To be counted, the completed ballot must be received by a particular time by local election officials. For the State Primary on September 1, the ballot needs to be returned by 8 p.m. on September 1. For the State Election on November 3, a ballot, if mailed, needs to be postmarked by November 3 and it must reach the local election office by November 6. Hand-delivered ballots must be returned by 8 p.m. on November 3 for the State Election. *See* Mass. Stat. 2020, c. 115, § 6(h)(3).

92. For mail-in ballots, the envelopes provided to voters from Massachusetts are postage prepaid First-Class Mail rate for returned ballots.

93. Approximately 14 percent of the Massachusetts population is age 65 or older.

94. As of August 19, 2020, Massachusetts had 4,642,444 registered voters, of whom 1,081,089 have requested mail-in ballots for the September 1 primary election.

North Carolina

95. North Carolina has been safely and securely administering elections, including by giving voters the option to vote by mail for any reason, since 1999.

96. To vote by mail, voters must first be registered to vote. N.C. Gen. Stat. § 163-82.1. To vote in the 2020 general elections in North Carolina, voters who wish to register online or in-person must do so by October 9, 2020. N.C. Gen. Stat. § 163-82.6(d). Voters who wish to register by mail must ensure that their registration application is postmarked by October 9, 2020. *Id.*

97. To vote by mail, the voter must first request an absentee ballot by filling out a form provided by the North Carolina State Board of Elections. N.C. Gen. Stat. § 163-230.2. This form is available for download at the State Board's website and is also available for pickup at all

county board of elections offices. *Id.* The form can also be mailed to the interested voter upon request. *Id.* Absentee ballots may be requested until 5 p.m. on October 27, 2020. N.C. Gen. Stat. § 163-230.1(a). If the voter is requesting her absentee ballot by mail, the county board of elections office to which the voter sends her request must receive the request by 5 p.m. on October 27, 2020. *Id.*

98. County boards of elections will begin mailing absentee ballots to voters who have requested them using the request form beginning on September 4, 2020.

99. Voters may return completed ballots by mail. N.C. Gen. Stat. § 163-231(b). Alternatively, they may return completed ballots in-person to a county board of elections office or to early-voting sites during the early-voting period. *Id.* Absentee ballots must be returned to the county board of elections no later than 5 p.m. on Election Day. *Id.* Absentee ballots received after 5 p.m. on Election Day will be counted only if they are postmarked on or before Election Day *and* are received by mail no later than 5 p.m. three days after Election Day (in 2020, November 6). *Id.*

100. In a recent survey, 48 percent of likely voters in North Carolina said that they were "likely to vote by mail" in the 2020 General Election, compared to the 3 percent who voted by mail in 2016.[7] In 2016, 4,769,640 voters cast ballots. Assuming a similar number of voters cast ballots in 2020, North Carolina is preparing for approximately 2.29 million voters to cast absentee ballots.

101. Approximately 16.7 percent of North Carolina residents are senior citizens, age 65 or older.

[7] Charles Duncan, *Can North Carolina Handle Record Numbers of Absentee Ballots?*, Spectrum News1 (Aug. 1, 2020), https://spectrumlocalnews.com/nc/charlotte/news/2020/07/31/north-carolina-sees-record-number-of-absentee-ballot-requests.

102. As of August 19, 2020, North Carolina has received 295,959 requests for absentee ballots.

III. The United States Postal Service

103. The Constitution empowers Congress to "establish Post Offices and post Roads." U.S. Const., art. I, § 8, cl. 7. The importance of the postal service "was prefigured by the Continental Congress' appointment of Benjamin Franklin to be the first Postmaster General, on July 26, 1775 . . . . From those beginnings, the Postal Service has become the nation's oldest and largest public business." *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 739 (2004) (internal citations and quotation marks omitted).

104. The Postal Service has played "a vital yet largely unappreciated role in the development of" the United States. *U. S. Postal Serv. v. Council of Greenburgh Civic Assocs.*, 453 U.S. 114, 121 (1981). During the early years of this country's development, "the Post Office was to many citizens situated across the country the most visible symbol of national unity." *Id.* at 122.

105. Today, the Postal Service's policy is to be "operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people." 39 U.S.C. § 101(a). Its services are "to bind the Nation together through the personal, educational, literary, and business correspondence of the people," which it does through "prompt, reliable, and efficient services to patrons in all areas." *Id.* The costs of "maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people." *Id.*

106. The Postal Service touches the lives of virtually every American.[8] Eighteen percent of Americans, and 40 percent of senior citizens, pay their bills via the mail. Nearly 20 percent of Americans who receive tax refunds do so through the mail. The Department of Veterans Affairs (VA) fills about 80 percent of veterans' prescriptions by mail, sending 120 million prescriptions a year. Every day, more than 330,000 veterans receive a package of prescriptions in the mail. More than half of the people who receive medication by mail are over the age of 65. Small businesses rely heavily on the Postal Service: 40 percent send packages via USPS every month and 25 percent fear that a post office closing would harm their business. In rural areas, where more than a third of post offices are located, the Postal Service provides a vital link to more than 14 million people without broadband access. In 2018, the Postal Service helped 42 million Americans securely vote in the midterm elections.

107. The Postal Service's critical role as an essential public service for all Americans is reflected in public opinion. According to the Pew Research Center, 91 percent of Americans have a favorable view of the Postal Service—higher than any other federal agency.

The Modern Postal Service

108. Postal service in the United States took its current form in 1970, when Congress passed the Postal Reorganization Act (PRA). *See* Pub. L. No. 91-375, 84 Stat. 719.

109. The PRA mandated that it "shall be the responsibility of the Postal Service to maintain an efficient system of collection, sorting, and delivery of the mail nationwide." 39 U.S.C. § 403(b)(1).

[8] Sam Berger & Stephanie Wylie, *Trump's War on the Postal Service Hurts All Americans*, Ctr. For Am. Progress (Aug. 19, 2020), https://www.americanprogress.org/issues/democracy/news/2020/08/19/489664/trumps-war-postal-service-hurts-americans/.

110. Under the PRA, the "Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a).

111. When "determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail." 39 U.S.C. § 101(e).

112. The PRA effected several changes designed "to increase the efficiency of the Postal Service and reduce political influences on its operations." *Flamingo Indus.*, 540 U.S. at 740.

113. First, the PRA gave the Postal Service its current name and made it "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201.

114. Second, the PRA created a board of governors, consisting of 11 members, to oversee the exercise of the Postal Service's power. 39 U.S.C. § 202(a). The President appoints nine of those governors with the advice and consent of the Senate. *Id.* Those nine appoint the tenth governor, who serves as the Postmaster General. *Id.* § 202(c). Those ten appoint the eleventh governor, who serves as the Deputy Postmaster General. *Id.* § 202(d).

115. Third, the PRA created the Postal Rate Commission—now called the Postal Regulatory Commission—as another "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 501.[9] The Commission has five presidentially appointed members, all to "be chosen solely on the basis of their technical qualifications,

[9] The sections of the PRA that created the Commission were initially codified at 39 U.S.C. §§ 3601-3604. In 2006, Congress transferred and modified certain provisions relating to the Postal Service, including those that established the Commission. Pub. L. No. 109-435, 120 Stat. 3198, 3238 (2006).

professional standing, and demonstrated expertise in economics, accounting, law, or public administration." *Id.* § 502.

116. The Commission has numerous responsibilities set forth in the PRA and the Postal Accountability and Enhancement Act. *See* Pub. L. No. 109-435, 120 Stat. 3198 (2006). Among them, anytime "the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis" it must first "submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change." 39 U.S.C. § 3661(b). Before the Commission issues an advisory opinion, it must hold a hearing on the record. *Id.* § 3661(c). The public is entitled to submit comments in proceedings before the Commission. 39 C.F.R. § 3010.140.

117. Prior to certain organizational changes implemented on August 7, 2020, the Postal Service maintained a headquarters and a field office structure composed of seven area offices (Eastern, Northeastern, Capital Metro, Great Lakes, Pacific, Southern, and Western), which themselves contained a total of 67 district offices that oversaw approximately 31,000 facilities. Post offices, branches, carrier stations, mail processing and distribution centers, network distribution centers, and other postal service facilities within a district reported up to the district office, which in turn reported up to the area office. District offices were responsible for implementing national policy and procedures within their districts.

118. Following operational changes implemented on August 7, 2020, retail and delivery operations are now divided into four areas (Atlantic, Southern, Central, and Western Pacific) and mail processing is divided into two areas (Eastern and Western).

Postal Service Operations

119. The Postal Service has formally adopted several classes of mail, including First-Class Mail and Marketing Mail, which are transported with different delivery standards and with different postage rates.

120. The Postal Service also offers Business Reply Mail, which enables the sender to provide a recipient with a prepaid method for replying to a mailing. Mail sent with a Business Reply Mail envelope is often not postmarked.

121. The processing and delivery of mail in the Postal Service network is a highly integrated and complex system through which an average of 470 million mailpieces move every day.

122. The Postal Service operates on a 24-hour clock, and every step of the mail processing and delivery stream leads into the next.

123. The majority of incoming mail—including letters, flats, and parcels—is processed overnight by postal workers and mail handlers at mail processing facilities, otherwise known as plants. Processing mail involves applying a postmark and sorting and arranging the mail for transportation and delivery. Most mail processing is now automated, with processing machines ultimately sorting the vast majority of mail into "delivery point sequence," i.e., into the delivery order that will be used by the letter carrier on her route. Processed mail is dispatched in trucks from the plants in the very early morning (often 5 or 6 a.m.), where it travels either to non-local destinations for further processing or to delivery units (e.g., a post office or carrier station) for delivery to local destinations.

124. Processed mail ready for delivery normally arrives at the delivery unit in the morning (often 8 or 9 a.m.), where any final sequencing is carried out by clerks and letter

carriers. Carriers deliver the processed mail and collect new mail on foot or by vehicle in a prescribed area during general business hours (i.e., between approximately 9 a.m. and 6 p.m.). In the evening, mail collected by carriers on their routes and mail collected by clerks at post offices is sent from the delivery unit by truck to the processing plant; this process is known as the final dispatch of value. When the collected mail arrives at the processing plant, the cycle begins again.

125. Because the Postal Service has long embraced a philosophy that every piece of mail goes out of the plant or delivery unit every day, regardless of conditions, overtime is necessary. If a tray of mail is not ready when the truck is scheduled to depart the processing plant, the truck would ordinarily wait. Likewise, if the processed mail has not arrived at the delivery unit when the carrier arrives for work, the carrier would ordinarily wait for the mail to arrive before departing on her route. If additional mail arrives while the carrier is out on her route or if that day's mail was too much to carry in one trip, the carrier would ordinarily make a second trip to ensure every piece was delivered that day.

126. For the last decade, the Postal Service has experienced a decline in letter mail but an increase in parcels. Parcels can be bulkier and heavier and may require additional time to process and deliver. Recently, COVID-19 has caused a spike in parcels as Americans spend more time at home and avoid going out.

127. COVID-19 has caused staffing shortages at USPS and exacerbated the use of overtime, especially among letter carriers. If a letter carrier is sick, quarantining, dealing with the absence of child care, or otherwise unable to complete her route, then another carrier would need to work on an off-shift to ensure that the mail is delivered.

IV. Role of USPS in Ensuring Free and Fair Elections

128. Over the past several decades, voting by mail has steadily expanded nationwide. In 1996, 7.8 percent of Americans mailed in their votes; in 2016, 20.9 percent did.[10] Today, every state offers some form of voting by mail.

129. A growing number of states conduct all-mail elections, in which every registered voter is mailed a ballot. Oregon conducted the first presidential election completely by mail in 2000.[11] Washington allowed counties to hold all-mail elections in 2005; by 2011, after 38 of 39 counties were conducting all-mail elections, the Washington Legislature implemented mail-in voting statewide.[12] In Utah, jurisdictions have been permitted to conduct elections by mail since 2012; all jurisdictions have done so since 2019.[13] Colorado has been sending all voters mail-in ballots since 2013[14] and Hawai‘i will be conducting elections entirely by mail for the first time in 2020.[15] In response to the national health crisis caused by the COVID-19 pandemic, four

[10] Pew Research Center, *Share of voters casting ballots by mail has steadily risen since 1996* (June 23, 2020), https://www.pewresearch.org/fact-tank/2020/06/24/as-states-move-to-expand-the-practice-relatively-few-americans-have-voted-by-mail/ft_2020-06-24_votebymail_01/.

[11] J. Edward Moreno, *Here's where your state stands on mail-in voting*, The Hill (June 9, 2020), https://thehill.com/homenews/state-watch/501577-heres-where-your-state-stands-on-mail-in-voting.

[12] Wash. Sec'y of State, *Washington Vote-By-Mail Fact Sheet*, https://www.sos.wa.gov/_assets/elections/wa_vbm.pdf.

[13] Nat'l Conf. of State Legislatures, *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options* (July 10, 2020), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

[14] Moreno, *supra* note 11.

[15] Nat'l Conf. of State Legislatures, *supra* note 13.

additional states—California, New Jersey, Nevada, and Vermont—and the District of Columbia adopted laws that will automatically mail ballots to all eligible registered voters.[16]

130. An additional 28 states allow voters to vote by mail without an excuse. Six others allow voters to cite the COVID-19 pandemic to vote by mail. And in seven other states, voters may request a mail-in ballot if they will not be able to vote in person on the day of the election.[17]

131. To accommodate the widespread adoption of mail-in balloting, USPS has in recent years adopted a number of policies and procedures to ensure the speedy and efficient processing of "Election Mail."

132. "Election Mail" is a term of art within USPS, used to describe any item mailed to or from authorized election officials that enables citizens to participate in the voting process, such as balloting materials, voter registration cards, absentee ballot applications, and polling place notifications.

133. The Postal Service has traditionally given Election Mail its highest priority, regardless of the class of mail.

134. In an August 14, 2008, Postal Bulletin (PB 22239), the Postal Service stated that it "stands ready to do everything it can to make sure voters experience a smooth, well-organized process—one that provides them with the highest levels of trust and confidence when they cast their ballots by mail." It was "critical" that "Postal Service employees be ready to provide reliable service and delivery for this very important and time-sensitive mail," which "must be

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[16] Kate Rabinowitz & Brittany Renee Mayes, *At least 77% of American voters can cast ballots by mail in the fall*, Wash. Post. (last updated Aug. 14, 2020), https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/; Juliette Love, et al., *Where Americans Can Vote by Mail in the 2020 Elections*, N.Y. Times (last updated Aug. 14, 2020) https://www.nytimes.com/interactive/2020/08/11/us/politics/vote-by-mail-us-states.html.

[17] *See supra* note 16.

handled promptly and receive equal care and attention." The Bulletin reminded employees that "[w]illful delay of absentee balloting material or other election material is a violation of policy, ethics, and law."

135. In a July 26, 2012, Postal Bulletin (PB 22342), the Postal Service stated that in the lead up to the November 2012 election, "Vote-by-Mail ballots and other mail prepared by election officials will be entering the mailstream" and "Postal Service employees need to watch for this important time-sensitive mail and do their part to ensure each mailing receives the highest level of service." The Bulletin provided detailed standard operating procedures for the acceptance of Election Mail. The Bulletin also explained that the Postal Service would suspend its network consolidations from September through December 2012 "[d]ue to the volume of high-priority mail predicted for the election as well as the holiday mailing seasons."

136. In 2016, the Postal Service began providing an Election Mail communications plan in multiple issues of the Postal Bulletin. (PB 22437, 22443, 22449).

137. In a September 1, 2016, Postal Bulletin (PB 22449), the Postal Service acknowledged that the "U.S. Mail is an important part of the U.S. election process." It reminded employees that in the lead up to the November 2016 election, "Vote-by-Mail ballots and other mail prepared by election officials will be entering the mailstream" and "Postal Service employees need to watch for this important time-sensitive mail and do their part to ensure each mailing receives the highest level of service." In response to concerns that "changes in delivery standards could require additional time for Election Mail" to reach voters, the Postal Service announced that "plans [were] in place from coast to coast to ensure the timely receipt, processing, and delivery of election and political mail."

138. Among the key objectives of USPS's Election Mail communications plan for 2016 were to "[a]ssure election officials that ballots will be handled correctly" and "[i]ncrease attentiveness among employees that when they encounter official Election Mail . . . to always handle it promptly and provide it with equal care and attention." Among the key messages was that "the Postal Service can be trusted to deliver ballots in a timely manner." Because the Postal Service had made service standard changes in the last year, "Postal Service representatives [were] working closely with local and federal election officials to address and alleviate any concerns."

139. The Department has so far issued three Postal Bulletins that address Election Mail ahead of the November 2020 general election. (PB 22539, 22546, 22551).

140. In its July 30, 2020, Postal Bulletin (PB 22551), the Postal Service expressed its commitment "to fulfilling its role in the electoral process for those public policy makers who chose to use our organization as a part of their election system." It acknowledged that "voting by mail is increasing in popularity across broad segments of the American electorate, and the Coronavirus (COVID-19) pandemic has accelerated this trend." The Postal Service indicated that it expected more than a quarter of all voters to cast ballots by mail in light of recent changes related to COVID-19.

141. Among the key objectives of its Election Mail plan for 2020 are to "[i]nform election officials that ballots will be delivered according to USPS® service standards" and "[e]nsure Postal Service employees know that they must always promptly and efficiently handle Election Mail . . . with equal care and attention." Among the key messages is that "[c]ustomers can trust the Postal Service to deliver their mailed ballots in a timely manner."

142. Due to the importance of Election Mail, the Postal Service has historically delivered ballots even if they lack sufficient postage.

143. For example, an August 14, 2008, Postal Bulletin (PB 22239) stated that: "It is critical that this mail is handled correctly to avoid any negative impact on election results or the Postal Service. *Employees need to be aware that absentee balloting materials are handled differently than other unpaid or short-paid mailpieces.* ***ABSENTEE BALLOTING MATERIALS ARE NOT TO BE RETURNED FOR ADDITIONAL POSTAGE OR DETAINED!*** The postage is collected from the election office. Any delay of absentee ballots is a violation of Postal Service policy" (emphasis in original).

144. Likewise, in its July 26, 2012, Postal Bulletin (PB 22342), the Postal Service stated that "short-paid and unpaid absentee balloting materials must never be returned to the voter for additional postage. Postage is collected from the election office upon delivery or at a later date."

145. On April 22, 2020, Postal Service spokesperson Martha Johnson reaffirmed that it "is the postal service's policy not to delay the delivery of completed absentee or vote-by-mail ballots even if no postage has been affixed or if the postage is insufficient."

146. The Postal Service has developed the Official Election Mail logo, a unique registered trademark "used on any mailpiece created by an election official that is mailed to or from a citizen of the United States for the purpose of participating in the voting process." Use of the logo "serves to identify Official Election Mail for Postal Service workers and distinguish it from the thousands of other mailpieces that are processed daily." The Postal Service issues Publication 631 to aid state and local election officials in using the logo.

147. The Postal Service also issues Publication 632, which provides state and local election officials with guidance on how to send Election Mail. The Postal Service has issued Publication 632 since at least September 2005.

148. In November 2007, the Postal Service developed the green Tag 191 to provide greater visibility to ballot mail during Postal Service handling. Election officials can use Tag 191 to identify trays and sacks of ballot mail destined for either domestic or international addresses. Tag 191 is not used for all Election Mail; instead it helps identify only actual ballots.

149. As part of its priority treatment of Election Mail, the Postal Service has historically delivered Election Mail at First-Class Mail delivery standards regardless of the class of mail used.

150. In its audit of the 2018 elections, the Postal Service Office of Inspector General (OIG) concluded, based on interviews with management at audited mail facilities, that Election Mail is generally handled as First-Class Mail. OIG found that 95.6 percent of Election Mail in 2018 met the 1-3 day service standard for First-Class Mail.

151. The highest performing mail facilities audited by OIG took affirmative steps to ensure that Election Mail be given priority attention, including: having personnel separate and identify Election Mail from other mail in the facility and facilitating timely and frequent communications with all levels of plant staff about policies and procedures for Election Mail.

152. The 2018 audit recommended Postal Service management take several key steps to ensure timely delivery of Election Mail, which "is necessary to ensure the integrity of the U.S. election process." These steps included ensuring "sufficient mail processing staff are assigned to appropriately process peak" Election Mail volume.

V. The Administration's Efforts to Undermine Voting by Mail

President Trump's Campaign Against Mail-in Voting

153. In November 2017, President Trump appointed Robert M. Duncan to the Postal Service Board of Governors; he was confirmed by the Senate the following year and currently serves as the Board's Chairman.

154. Duncan had previously served as Chairman of the Republican National Committee (RNC) from 2007 to 2009. His official USPS biography states, "As RNC Chairman, he raised an unprecedented $428 million and grew the donor base to 1.8 million – more donors than at any time in RNC history."[18]

155. In May 2020, the Board of Governors selected Louis DeJoy to serve as the 75th Postmaster General and Chief Executive Officer. DeJoy had no prior experience working at the Postal Service. He began serving as Postmaster General on June 15, 2020.

156. DeJoy, a longtime Republican fundraiser, had donated more than $1.2 million to the Trump Victory Fund, millions more to Republican organizations and candidates, and, at the time of his appointment, was overseeing fundraising for the 2020 Republican National Convention.[19] DeJoy also continues to own at least $30 million in USPS competitor XPO and stock options in Amazon.[20]

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[18] USPS, *Postal Leadership: Robert M. Duncan* (last updated Dec. 2019), https://about.usps.com/who/leadership/board-governors/robert-duncan.htm.

[19] Brian Naylor, *New Postmaster General Is Top GOP Fundraiser*, NPR (May 7, 2020), https://www.npr.org/2020/05/07/851976464/new-postmaster-general-is-top-gop-fundraiser.

[20] Marshall Cohen, *Financial disclosures reveal postmaster general's business entanglements and likely conflicts of interest, experts say*, CNN (Aug. 12, 2020), https://www.cnn.com/2020/08/12/politics/postal-service-dejoy-conflicts-amazon-trades-xpo-stake/index.html.

157. Shortly before DeJoy's appointment, President Trump began a campaign of false claims about mail-in voting, alleging repeatedly that it is vulnerable to widespread fraud.

158. During this time, President Trump has made the following false and unsubstantiated statements regarding mail-in voting:

a. On March 30, 2020, the President stated that he was opposed to a bill that would reform voting by mail because the bill would have allowed for "levels of voting that if you'd ever agreed to it, you'd never have a Republican elected in this country again."[21]

b. On April 11, 2020, the President tweeted, "Mail in ballots substantially increases the risk of crime and VOTER FRAUD!"[22]

c. On May 24, 2020, the President tweeted, "The United States cannot have all Mail In Ballots. It will be the greatest Rigged Election in history. People grab them from mailboxes, print thousands of forgeries and 'force' people to sign. Also, forge names. Some absentee OK, when necessary. Trying to use Covid for this Scam!"[23]

d. On May 28, 2020, the President tweeted, "MAIL-IN VOTING WILL LEAD TO MASSIVE FRAUD AND ABUSE. IT WILL ALSO LEAD TO THE

[21] Sam Levine, *Trump says Republicans would 'never' be elected again if it was easier to vote*, The Guardian (Mar. 30, 2020), https://www.theguardian.com/us-news/2020/mar/30/trump-republican-party-voting-reform-coronavirus.

[22] Donald J. Trump (@realDonaldTrump), Twitter (Apr. 11, 2020, 8:29 p.m.), https://twitter.com/realDonaldTrump/status/1249132374547464193.

[23] Donald J. Trump (@realDonaldTrump), Twitter (May 24, 2020, 10:08 a.m.), https://twitter.com/realDonaldTrump/status/1264558926021959680.

END OF OUR GREAT REPUBLICAN PARTY. WE CAN NEVER LET THIS TRAGEDY BEFALL OUR NATION . . . ."[24]

e. On June 22, 2020, the President tweeted, "RIGGED 2020 ELECTION: MILLIONS OF MAIL-IN BALLOTS WILL BE PRINTED BY FOREIGN COUNTRIES, AND OTHERS. IT WILL BE THE SCANDAL OF OUR TIMES!"[25]

f. Also on June 22, 2020, the President tweeted, "Because of MAIL-IN BALLOTS, 2020 will be the most RIGGED election in our nations [sic] history – unless this stupidity is ended. We voted during World War One & World War Two with no problem but now they are using Covid in order to cheat by using Mail-Ins!"[26]

g. On June 28, 2020, the President tweeted, "Absentee Ballots are fine. A person has to go through a process to get and use them. Mail-In Voting, on the other hand, will lead to the most corrupt Election is [sic] USA history. Bad things happen with Mail-Ins. Just look at Special Election in Patterson, N.J. 19% of Ballots a FRAUD!"[27]

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[24] Donald J. Trump (@realDonaldTrump), Twitter (May 28, 2020, 9:00 p.m.), https://twitter.com/realDonaldTrump/status/1266172570983940101.

[25] Donald J. Trump (@realDonaldTrump), Twitter (June 22, 2020, 7:16 a.m.), https://twitter.com/realDonaldTrump/status/1275024974579982336.

[26] Donald J. Trump (@realDonaldTrump), Twitter (June 22, 2020, 9:45 a.m.), https://twitter.com/realDonaldTrump/status/1275062328971497472.

[27] Donald J. Trump (@realDonaldTrump), Twitter (June 28, 2020, 10:30 p.m.), https://twitter.com/realDonaldTrump/status/1277429217190428673.

h. On July 21, 2020, the President tweeted, "Mail-In Voting, unless changed by the courts, will lead to the most CORRUPT ELECTION in our Nation's History! #RIGGEDELECTION."[28]

i. On July 30, 2020, the President tweeted, "Mail-In Voting is already proving to be a catastrophic disaster. Even testing areas are way off. The Dems talk of foreign influence in voting, but they know that Mail-In Voting is an easy way for foreign countries to enter the race. Even beyond that, there's no accurate count!"[29]

j. On August 4, 2020, the President tweeted, "Whether you call it Vote by Mail or Absentee Voting, in Florida the election system is Safe and Secure, Tried and True. Florida's Voting system has been cleaned up (we defeated Democrats attempts at change), so in Florida I encourage all to request a Ballot & Vote by Mail! #MAGA."[30]

k. On August 5, 2020, the President tweeted, "Nevada has ZERO infrastructure for Mail-In Voting. It will be a corrupt disaster if not ended by the Courts. It will take months, or years, to figure out. Florida has built a great

[28] Donald J. Trump (@realDonaldTrump), Twitter (July 21, 2020, 7:41 a.m.), https://twitter.com/realDonaldTrump/status/1285540318503407622.

[29] Donald J. Trump (@realDonaldTrump), Twitter (July 30, 2020, 8:10 a.m.), https://twitter.com/realDonaldTrump/status/1288809157722877952.

[30] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 4, 2020, 12:55 p.m.), https://twitter.com/realDonaldTrump/status/1290692768675901440.

infrastructure, over years, with two great Republican Governors. Florida, send in your Ballots!"[31]

l. On August 15, 2020, the President tweeted, "The honorable thing to do is drop the Mail-In Scam before it is too late! Absentee Ballots, like they have in Florida, are good!"[32]

m. On August 17, 2020, the President tweeted, "Some states use 'drop boxes' for the collection of Universal Mail-In Ballots. So who is going to 'collect' the Ballots, and what might be done to them prior to tabulation? A Rigged Election? So bad for our Country. Only Absentee Ballots acceptable!"[33]

n. On August 20, 2020, the President tweeted, "The Democrats are demanding Mail-In Ballots because the enthusiasm meter for Slow Joe Biden is the lowest in recorded history, and they are concerned that very few people will turn out to vote. Instead, they will search & find people, then "harvest" & return Ballots. Not fair!"[34]

o. On August 20, 2020, the President tweeted, "They are sending out 51,000,000 Ballots to people who haven't even requested a Ballot. Many of those people

[31] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 5, 2020, 7:08 a.m.), https://twitter.com/realDonaldTrump/status/1290967953542909952.

[32] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 15, 2020, 4:24 p.m.), https://twitter.com/realDonaldTrump/status/1294731591030378497.

[33] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 17, 2020, 11:40 a.m.), https://twitter.com/realDonaldTrump/status/1295385113862090753.

[34] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 20, 2020, 7:57 p.m.), https://twitter.com/realDonaldTrump/status/1296597150181330944.

> don't even exist. They are trying to STEAL this election. This should not be allowed!"[35]

159. During this period, the Trump Campaign or the RNC filed a number of lawsuits against states that allow for voting by mail, including Pennsylvania and California. On June 19, 2020, President Trump said about his election prospects that, "My biggest risk is that we don't win lawsuits" and "We have many lawsuits going all over. And if we don't win those lawsuits, I think—I think it puts the election at risk."[36]

160. On August 13, 2020, during a television interview, President Trump explained that he opposed additional funding for the Postal Service because he wanted to prevent expanded mail-in voting: "Now they need that money in order to have the post office work so it can take all of these millions and millions of ballots. Now, in the meantime, they aren't getting there. By the way, those are just two items. But if they don't get those two items, that means you can't have universal mail-in voting because they're not equipped to have it."[37]

Changes to Postal Operations

161. In early July 2020, at the direction of Postmaster General DeJoy, the Postal Service instituted several operational changes affecting how mail is transported.

162. These operational changes altered "the nature of postal services" and "affect[ed] service on a nationwide or substantially nationwide basis." 39 U.S.C. § 3661(b).

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[35] Donald J. Trump (@realDonaldTrump), Twitter (Aug. 20, 2020, 8:15 p.m.), https://twitter.com/realDonaldTrump/status/1296601698891374593.

[36] Christina A. Cassidy & Nicholas Riccardi, *Trump: Mail-in voting presents 'biggest risk' to reelection*, AP News (June 19, 2020), https://apnews.com/419b8fc1a387e4f85a91429651c59b76.

[37] Barbara Sprunt & Alana Wise, *Trump Opposes Postal Service Funding But Says He'd Sign Bill Including It*, NPR (Aug. 13, 2020), https://www.npr.org/2020/08/13/902109991/trump-admits-to-opposing-funding-for-postal-service-to-block-more-voting-by-mail.

163. At the direction of DeJoy, the Postal Service instituted these operational changes immediately and on a nationwide basis without first obtaining an advisory opinion from the Postal Regulatory Commission.

164. Two documents prepared by Postal Service employees reflect these operational changes. The first, a document titled "Mandatory Stand-Up Talk: All Employees" was dated July 10, 2020 (the "July 10 Stand-Up Talk," Ex. A). The second, a PowerPoint presentation entitled "PMGs [Postmaster General's] expectations and plans" (the "July PPT," Ex. B) was prepared at around the same time.

165. "Stand-Up Talks" are a widely used means of providing postal employees with information about changes or updates in Postal Service policies and procedures. Postmasters and supervisors are expected to communicate the contents of a "Stand-Up Talk" to the relevant employees at the beginning of their shift. The relevant employees are then expected to abide by those policies and procedures.

166. The July 10 Stand-Up Talk states that it must be provided to "all employees" and that "[e]very single employee will receive this information, no matter what job they perform[.]" Out of a need to make "immediate, lasting, and impactful changes," the July 10 Stand-Up Talk ordered an "operational pivot" targeted at the transportation of mail. It provides specific examples of "transportation changes being implemented immediately (today)." These changes included:

a. "All trips will depart on time (Network, Plant and Delivery); late trips are no longer authorized or accepted."

b. "Extra trips are no longer authorized or accepted."

c. "Carriers must begin on time, leave for the street on time, and return on time."

d. "Carriers must make the final dispatch of value; no additional transportation will be authorized to dispatch mail to the Plant after the intended dispatch."

167. The functional result of these operational changes is that mail can be delayed at multiple places in the mailstream. If processed mail is not ready when the truck is scheduled to leave the processing plant, then that mail is left behind for the day. If the truck is delayed on its way to the delivery unit, then the carrier must leave on her route at her start time without that day's mail. If the carrier is unable to deliver all of that day's mail before her return time, then she must return to the delivery unit with that mail undelivered and any new mail uncollected. If the mail carrier did not depart with all of that day's mail—for example, because it was too much to carry or because additional mail arrived after she left—then that carrier cannot make extra trips and that mail remains in the delivery unit overnight. And if the carrier returns to the delivery unit after the truck has returned to the plant, then any new mail collected that day remains at the delivery unit overnight and will not be sent to the plant until the following day.

168. The July 10 Stand-Up Talk acknowledges that as a result of the changes, postal employees will see mail "left behind" and "on the workroom floor or docks" of processing plants. The Stand-Up Talk acknowledges that these consequences are "not typical."

169. The July 10 Stand-Up Talk estimated that the changes implemented would result in around $200 million in reduced expenses. For Fiscal Year 2019, the Postal Service reported operating revenue of $71.1 billion and operating expenses of $79.9 billion.

170. In two July 22, 2020, letters to members of Congress (Ex. C), General Counsel Thomas Marshall confirmed that the Postal Service is "taking immediate steps to increase operational efficiency," including by "running operations on-time and on-schedule."

171. In an August 6, 2020, letter to members of Congress (Ex. D), Postal Service Chief Operating Officer David Williams confirmed that the Postal Service has taken "immediate steps" focused on "improving our transportation efficiency," including "working to eliminate extra and late trips." He also stated that the Postal Service was working to reduce "unnecessary" and "unauthorized" overtime and that "operational managers must ensure that overtime is earned as the result of unexpected volume or other factors pursuant to our normal overtime analysis before it is approved."

172. Similarly, DeJoy's opening remarks for a Board of Governors meeting on August 7, 2020 (Ex. E), confirm that the Postal Service had taken "immediate steps" focused on "running our operations on time and on schedule, and by not incurring unnecessary overtime or other costs."

173. In an August 11, 2020, letter to Congresswoman Carolyn Maloney (Ex. F), Marshall confirmed that the Postal Service had taken "immediate steps" focused on "improving our transportation efficiency," including "working to eliminate extra and late trips." He also stated that the Postal Service was working to reduce "unnecessary" and "unauthorized" overtime and that "operational managers must ensure that overtime is earned as the result of unexpected volume or other factors pursuant to our normal overtime analysis before it is approved."

174. In an internal memo from August 13, 2020 (Ex. G), DeJoy stated that the Postal Service "must make a number of significant changes," including "re-establish[ing] fundamental operating principles and then adher[ing] to them and run[ning] on time." He confirmed that he "began those efforts right away." As a result, he noted that the Postal Service now had an "on-time dispatch schedule" of "97.3 percent, up from 89.8 percent" and had "reduced extra trips by 71 percent."

175. On August 18, 2020, DeJoy issued a public statement (Ex. H). To "avoid even the appearance of any impact on election mail," he suspended several "initiatives" until "after the [November 2020] election is concluded." DeJoy did not state that these initiatives would be revoked, nor did he state how the Postal Service would operationalize the rollback of these unspecified suspended initiatives.

176. DeJoy characterized the suspended initiatives as "longstanding operational initiatives" that "predate[d] [his] arrival at the Postal Service." He did not otherwise specify which initiatives would be suspended.

177. DeJoy also stated that:

a. "Retail hours at Post Offices will not change."

b. "Mail processing equipment and blue collection boxes will remain where they are."

c. "No mail processing facilities will be closed."

d. "[O]vertime has, and will continue to be, approved as needed."

178. In the statement, DeJoy did not address the operational changes instituted at his direction in early July 2020, including the elimination of late and extra trips or the requirement that carriers adhere to rigid schedules.

179. On August 20, 2020, the Washington Post reported that DeJoy intends to make "far more sweeping changes to the U.S. Postal Service than previously disclosed," including requiring States to pay First-Class postage for ballots in the future.[38]

[38] Jacob Bogage, et al., *Postmaster general eyes aggressive changes at Postal Service after election*, Wash. Post (Aug. 20, 2020), https://www.washingtonpost.com/business/2020/08/20/us-postal-service-louis-dejoy/.

VII. Impact of Service Changes on Mail Delivery

180. In his August 13, 2020, memo, DeJoy acknowledged that the recent changes had had an effect on service, stating that "this transformative initiative has had unintended consequences that impacted our overall service levels."

181. Since July 2020, there has been widespread reporting by the news media on changes in Postal Service operations and significant delays in mail delivery across the nation.

182. Because late trips and extra trips are now prohibited, including in Plaintiff States, mail has been left behind at processing plants and delivery units. Because letter carriers throughout the country, including in Plaintiff States, have been ordered to depart for their routes at set times, even if the processed mail has not yet arrived, and then to return at set times, even if all mail has not yet been delivered, carriers have been forced to leave mail undelivered. And because workers are not allowed to spend sufficient time processing and delivering the mail, the mail piled up, leading to greater delays.[39]

183. In some areas, substitute workers are not being assigned when another worker is out, for reasons such as contracting COVID-19. While failing to assign substitute workers, USPS is simultaneously experiencing increased package volume.[40]

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[39] *E.g.*, Michael Sainato, *Postmaster general's changes causing mail delays, USPS workers say*, The Guardian (Aug. 16, 2020), https://www.theguardian.com/business/2020/aug/16/usps-mail-delays-postmaster-general-changes-workers; James Doubek, *Postal Workers Decry Changes And Cost-Cutting Measures*, KUOW (Aug. 11, 2020), https://kuow.org/stories/postal-workers-decry-changes-and-cost-cutting-measures.

[40] *E.g.*, Ellie Rushing, *Mail delays are frustrating Philly residents, and a short-staffed Postal Service is struggling to keep up*, Phila. Inquirer (Aug. 2, 2020), https://www.inquirer.com/news/philadelphia/usps-tracking-in-transit-late-mail-delivery-philadelphia-packages-postal-service-20200802.html; Peter Hall, *Does the mail seem slow? You're not imagining it*, The Morning Call (Aug. 1, 2020), https://www.mcall.com/news/pennsylvania/mc-nws-pa-usps-mail-delivery-operations-slow-20200801-nmabfad46bc43a5mebq23xogbi-story.html.

184. The combination of too few workers, elimination of late and extra trips, rigid adherence to start and end times, and increased package volume is causing undelivered mail and packages to pile up.[41] In places, this has left rotting food and dead animals inside mail processing plants.[42]

185. Elected officials, including officials in Plaintiff States, have received thousands of calls about delayed mail.[43]

186. The operational changes implemented by the Postal Service come as millions of individuals nationwide are complying with stay-at-home and safer-at-home orders in response to the COVID-19 pandemic.

187. The Pennsylvania Department of Health, for example, recommends that individuals have "access to several weeks of medications and supplies in case you need to stay

[41] *E.g.*, Sainato, *supra* note 39.

[42] *E.g.*, Laura J. Nelson & Maya Lau, *'Like Armageddon': Rotting food, dead animals and chaos at postal facilities amid cutbacks*, L.A. Times (Aug. 20, 2020), https://www.latimes.com/california/story/2020-08-20/usps-cutbacks-post-office-chaos; Scott Thistle, *Chicks shipped by mail are arriving dead, costing Maine farmers thousands of dollars*, Sun Journal (Aug. 19, 2020), https://www.sunjournal.com/2020/08/19/dead-chick-deliveries-costing-maine-farmers-thousands-of-dollars/.

[43] *E.g.*, Ellie Rushing & Jonathan Lai, *Philly mail delays are raising alarms about the 2020 election: 'This is a huge problem'*, Phila. Inquirer, (Aug. 6, 2020), https://www.inquirer.com/politics/election/mail-voting-phiadelphia-post-office-delays-20200806.html; Daniel Moore, *Should the USPS run like a business? Yearslong dispute roils mail delivery ahead of 2020 elections*, Pittsburgh Post-Gazette (Aug. 16, 2020), https://www.post-gazette.com/news/insight/2020/08/16/United-States-Postal-Service-mail-delivery-2020-elections-Trump-Doyle-Kelly-Toomey/stories/202008160025.

home for prolonged periods of time."[44] As a result, many people now rely on the mail for basic supplies.[45]

188. Consequently, delays in the mail mean that individuals are not receiving essential items, such as medicine, paychecks, and unemployment benefits.[46] In Pennsylvania, for example, some residents are have gone three weeks without packages and letters that would otherwise deliver medication, paychecks, and bills.[47] Customers across southern Maine have experienced delays on as many as 65,000 pieces of mail. Delaware state agencies have reported significant delays in the delivery of important mail, such as checks from the State Pension Office and EBT cards being delivered to recipients. In North Carolina, there have been sustained reports of late delivery—by at least two weeks—of mail and packages, including mail and packages that small businesses depend on and medicines for those in rural communities.[48] In California, one 77-year old resident with asthma complained of not receiving her inhaler for three weeks in the mail, despite it usually only taking three to five days.[49] Another California resident reported that it recently took nine days for a letter with First-Class postage to be delivered from San Diego to

[44] Pennsylvania Dep't of Health, *COVID-19 Information for At Risk Individuals* (last updated May 12, 2020), https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/At-Risk-Individuals.aspx.

[45] *E.g.*, Julie Zauzmer, *Amid national Postal Service crisis, D.C. area residents struggle without consistent mail*, Wash. Post (Aug. 15, 2020), https://www.washingtonpost.com/dc-md-va/2020/08/15/amid-national-postal-service-crisis-dc-area-residents-struggle-without-consistent-mail/.

[46] *E.g.*, Zauzmer, *supra* note 45.

[47] *See supra* note 43.

[48] Michelle Wolf, *Mail delays hurting local small business owners*, MyFox8 (Aug. 9, 2020), https://myfox8.com/news/mail-delays-hurting-local-small-business-owners/.

[49] Kate Irby, *US Postal Service suspending cuts — but will it help Californians?* Sacramento Bee (Aug. 18, 2020), https://www.sacbee.com/news/local/article245050900.html.

San Jose.[50] One California resident living in a rural area reported that she did not receive any mail for a month, and ended up receiving two sets of bills in one day.[51] California residents are incurring late-penalties because they have not received bills, and therefore cannot pay bills on time.[52]

189. Many Native American tribes in California depend solely on USPS to send and receive mail. Tribes are required to submit in writing to request to be notified of proposed projects within an area that is traditionally and culturally affiliated. Tribes must respond in writing within 30 days of receipt of the formal notification and request consultation on the proposed project. Without this request, there is no requirement that an organization implementing a proposed project engage in tribal consultation for the protection of Native American burials and cultural resources. USPS delays will increase missed deadlines and responses to lead agencies for the protection on Native American burials and cultural resources.

190. USPS delays deprive people of important prescription medication. Veterans and VA staff told members of the Senate Committee on Veterans' Affairs that medications "are often taking weeks to be delivered and causing veterans to miss doses of vital medications."[53] One postal worker reported that a pharmaceutical company had complained that there were delays in

[50] Emily Deruy, *Q&A: What does the Postal Service kerfuffle mean for California voters?*, The Mercury News (Aug. 18, 2020), https://www.mercurynews.com/2020/08/18/qa-what-does-the-postal-service-kerfuffle-mean-for-california-voters/.

[51] Kate Cimini, *Late deliveries, missing mail: Hundreds of Salinas residents want answers from USPS*, Salinas Californian (July 22, 2020), https://www.thecalifornian.com/story/news/2020/07/22/rural-california-residents-take-issue-u-s-postal-service/5456022002/.

[52] Cimini, *supra* note 51.

[53] Letter from Sen. Jon Tester, Sen. Gary Peters, and 29 other Senators to Postmaster General Louis DeJoy (Aug.13, 2020), https://www.veterans.senate.gov/download/usps-delays.

picking up its outgoing shipments.[54] One California resident reported that his eye medications took about 20 days to arrive from the time they were ordered from the local VA.[55]

191. Businesses, too, are not receiving essential payments, some going as long as two weeks without mail.[56] Small businesses in particular rely heavily on the Postal Service to ship products and pay vendors, and delays can have an outsized impact on business reputation and customer retention.[57] In 2019, 70 percent of businesses with fewer than 10 employees had used USPS within the previous six months and the majority use USPS more than any other vendor.[58] In California, one business reported that customers have not received a packages shipped via USPS for one to two weeks, when those packages were supposed to arrive within two days.[59] Other businesses report that their payment checks from vendors are not arriving, forcing business owners to incur extra costs to cancel checks and wire funds instead.[60] And yet other businesses have had to reimburse customers for products that have not arrived on time via USPS, sometimes

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[54] Brian Naylor, *Pending Postal Service Changes Could Delay Mail And Deliveries, Advocates Warn*, NPR (July 29, 2020), https://www.npr.org/2020/07/29/894799516/pending-postal-service-changes-could-delay-mail-and-deliveries-advocates-warn.

[55] Rosalind Adam, et al., *USPS Delays Are Causing People To Get Their Prescriptions Late*, BuzzFeed News (Aug. 17, 2020) https://www.buzzfeednews.com/article/rosalindadams/post-office-delay-prescription-medicine.

[56] Zauzmer, *supra* note 45.

[57] Samantha Masunaga, *How Postal Service cutbacks have left small businesses hurting*, L.A. Times (Aug. 19, 2020), https://www.latimes.com/business/story/2020-08-19/usps-changes-hurt-small-businesses.

[58] USPS OIG, *From Home Office to Post Office: Improving Microbusiness Engagement with the U.S. Postal Service* (Sept. 4, 2019), https://www.uspsoig.gov/sites/default/files/document-library-files/2019/RISC-WP-19-008.pdf.

[59] *Residents Throughout SoCal Report Increase In Package Delays From USPS*, CBS Los Angeles (Aug. 15, 2020), https://losangeles.cbslocal.com/2020/08/15/residents-throughout-socal-report-increase-in-package-delays-from-usps/.

[60] Masunaga, *supra* note 57.

having to ship replacement products through another delivery service, which cuts into business profits.[61]

192. State contracting and purchasing has also been impacted. The Pennsylvania Department of General Services has received numerous complaints from vendors concerning checks that appear to have been lost in the mail. The Department has also noticed that incoming mail from USPS has slowed significantly; on some occasions no mail is delivered and on other days what amounts to multiple days of mail is dropped off.

193. Mail delays have also slowed the delivery of legal documents and impeded legal proceedings. The Pennsylvania Department of Labor reports that at least 20 hearings before the Unemployment Compensation Review Board have been continued because the parties have not received the hearing notices (mailed 14 days in advance) or the documents for the telephone hearings (mailed 5 days in advance). There have also been delays in receipt of Department determinations and referee decisions, resulting in late appeals. The Pennsylvania Office of General Counsel's Criminal Unit, which handles extradition and interstate rendition matters, has experienced delays of a week to ten days in receiving extradition requests sent by USPS mail from Pennsylvania counties.

194. California's state agencies have been impacted by USPS delays, including various delayed licenses, payments, job applications, exams, lease payments, unemployment claims, equipment, hearing notices and other notices, subpoenas, personal protective equipment, and contracts, among other critical items.

[61] Masunaga, *supra* note 57.

VIII. Impact on the 2020 General Election

195. The effects of the Postal Service's operational changes also come on the eve of an election in which "an unprecedented number of people plan to vote by mail."[62]

196. In late July 2020, General Counsel Marshall sent letters to 46 states and the District of Columbia warning that the Postal Service cannot guarantee all ballots sent by mail for the November election will arrive in time to be counted.

197. Every Plaintiff State received a tailored version of this letter (the "Marshall Letters," Ex. I).

198. The letters explained that, under the Postal Service's reading of several of Plaintiff States' election laws, "certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards." Marshall cautioned Plaintiff States that any "mismatch creates a risk"—and for California, a "significant risk"—"that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them."

199. Marshall explained that "most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received."

200. Marshall recommended "that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters." If election officials use Marketing Mail, it "will result in slower delivery times and will increase the risk that voters will not receive their ballots in time to return them by mail."

[62] Zauzmer, *supra* note 45.

201. The Marshall Letters did not reference or reaffirm any of the Postal Service's longstanding practices and policies of treating Election Mail with the highest priority and providing Election Mail with First-Class Mail delivery standards.

202. The Marshall Letters assumed that the Postal Service was operating pursuant to its normal delivery standards. The letters did not reference the operational changes instituted in early July 2020 that have significantly undermined the Postal Service's ability to meet its normal delivery standards.

203. For the November 2020 general election, Pennsylvania, Delaware, and Maine require ballots to be received on or before Election Day to be counted. North Carolina requires ballots to be received on or before Election Day, or postmarked on or before Election Day and received by November 6. Massachusetts, the District of Columbia, and California require ballots to be postmarked on or before Election Day and received by November 6, November 13, and November 20, respectively.

204. In response to the Marshall Letter, Pennsylvania requested the Pennsylvania Supreme Court to order that mail ballots be counted as long as they are received by the Friday after Election Day and postmarked on or before Election Day.[63]

205. In response to USPS delays and President Trump's remarks, voters have reported that they "have great fear they [their] vote won't count" because they are "not sure if [they] can trust the mail right now."[64] Voters who have experienced mail delays, "will definitely vote" but

[63] Jonathan Lai & Ellie Rushing, *USPS says Pennsylvania mail ballots may not be delivered on time, and state warns of 'overwhelming' risk to voters*, Phila. Inquirer (updated Aug. 16, 2020), https://www.inquirer.com/politics/election/pennsylvania-mail-voting-deadlines-post-office-lawsuit-20200813.html.

[64] Irby, *supra* note 49.

will not "use the mail for it because of the delays."[65] These voters are making plans to "go in person to make sure [they're] counted,"[66] which poses the risk of exposure to COVID-19. California's Secretary of State has received a significant increase in calls and inquiries from voters concerned about the November 2020 general election and the implications of potential USPS delays.

206. The service delays caused by Postal Service's implementation of sweeping new policies in the midst of a pandemic may disenfranchise voters because their ballots will not be sent or received in time and may deter people from voting because they do not trust that their ballot will be delivered.

207. During the global pandemic, voting by mail is the safest method for all voters.[67] To reduce the risk of contracting COVID-19, individuals are advised to limit interactions with other people as much as possible, including by reducing otherwise routine events, such as visiting the pharmacy.[68]

208. The need to limit even routine interactions makes the option to vote by mail an essential option for all voters, but particularly important for those who are most likely to become severely ill.[69]

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[65] Rushing & Lai, *supra* note 43.

[66] Irby, *supra* note 49.

[67] Rushing & Lai, *supra* note 43; Sam Levine, *Postal service changes pose threat to voting, says former USPS deputy*, The Guardian (Aug. 13, 2020), https://www.theguardian.com/us-news/2020/aug/13/united-states-postal-service-trump-republicans.

[68] CDC, Coronavirus Disease 2019, *Your Health, Older Adults* (updated Aug. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

[69] CDC, Coronavirus Disease 2019 (COVID-19), *Your Health, People Who Are at Increased Risk for Severe Illness* (updated June 25, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html.

209. The option to vote by mail is critically important for people over 65. Eighty percent of deaths from COVID-19 have been adults 65 and older and the rate of hospitalizations per 100,000 population due to COVID-19 drastically increases with age: from 27.2 for those 18-29, to 136.1 for those 50-64, 198.7 for those 65-74, 329.3 for those 75-84, and 513.2 for those 85 and older.[70] In California alone, almost 75 percent of the over 11,000 deaths from COVID-19 have been adults age 65 and older.[71]

210. People of any age are also at an increased risk of severe illness from COVID-19 if they have any of a host of underlying health conditions,[72] although many of those conditions are more prevalent among older adults.[73]

211. Voters over 65 and those with disabilities are already the most likely to vote by mail nationwide.[74] A national survey of the 2016 election found that "'33 percent of voters 70

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[70] Nat'l Ctr. for Health Statistics Mortality Reporting System, *Coronavirus Disease 2019 (COVID-19)-Associated Hospitalization Surveillance Network (COVID-NET)* (data through week ending June 6, 2020) https://www.cdc.gov/coronavirus/2019-ncov/images/need-extra-precautions/high-risk-age.jpg; CDC, Coronavirus Disease 2019, *Your Health, Older Adults* (updated Aug. 16, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

[71] Cal. Dep't of Public Health, *Cases and Deaths Associated with COVID-19 by Age Group in California* (Aug. 18, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-Age-Group.aspx.

[72] CDC, Coronavirus Disease 2019, *Your Health, People with Certain Medical Conditions* (updated Aug. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

[73] Pa. Dep't of Health, *COVID-19 Information for At Risk Individuals* (updated May 12, 2020), https://www.health.pa.gov/topics/disease/coronavirus/Pages/Guidance/At-Risk-Individuals.aspx.

[74] Kevin Morris, *Who Votes by Mail?*, Brennan Center for Justice (Apr. 15, 2020), https://www.brennancenter.org/our-work/analysis-opinion/who-votes-mail; Charles Stewart III, *Some Demographics on Voting by Mail*, Election Updates (Mar. 20, 2020), https://election

years and older voted absentee, compared to 20 percent of voters in their thirties' and that '30 percent of voters with a disability that kept the voter "from participating fully in work, school, housework, or other activities" voted absentee, compared to 22 percent of voters without a disability.'"[75]

212. In response to COVID-19, the Centers for Disease Control and Prevention (CDC) guidance recommends election officials consider "offering alternatives to in-person voting if allowed in the jurisdiction," and relocate polling places away from "nursing homes, long-term care facilities, and senior living residences, to help protect older adults and those with medical conditions." For voters, the CDC recommends considering "voting alternatives available in your jurisdiction that minimize contact," including "us[ing] early voting, if available," and "vot[ing] at off-peak times."[76]

213. Pennsylvania Governor Tom Wolf and Secretary of the Commonwealth Kathy Boockvar both encouraged voters in the June primary election to "vote safely" by mail,[77] as have leaders of other Plaintiff States.[78] Both Republican and Democratic party officials in

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updates.caltech.edu/2020/03/20/some-demographics-on-voting-by-mail/ (citing data from the Cooperative Congressional Election Study, Harvard University, https://cces.gov.harvard.edu/).

[75] U.S. Election Assistance Comm'n, Election Administration and Voting Survey, *Deep Dive, Early, Absentee, and Mail Voting* (Oct. 17, 2017), https://www.eac.gov/sites/default/files/document_library/files/eavsdeepdive_earlyvoting_101717.pdf (quoting Charles Stewart III, *2016 Survey of the Performance of American Elections*, MIT 13, https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/Y38VIQ#).

[76] CDC, Coronavirus Disease 2019, *Community, Work & School, Considerations for Election Polling Locations* (updated June 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

[77] Press Release, *Gov. Wolf Encourages Voters to Apply for a Mail-in Ballot* (Apr. 22, 2020), https://www.governor.pa.gov/newsroom/gov-wolf-encourages-voters-to-apply-for-a-mail-in-ballot/.

[78] Governor John Carney (@JohnCarneyDE), Twitter (Aug. 18, 2020, 11:13 a.m.), https://twitter.com/JohnCarneyDE/status/1295740564969869320. California Governor Gavin

Pennsylvania "have encouraged people to vote by mail amid concerns from county officials who fear the virus will make it difficult to find polling places and get poll workers to staff them."[79]

IX. Harm to the States as a Result of Defendants' Actions

214. Defendants' actions have caused and will continue to cause injury to the States' sovereign, quasi-sovereign, and proprietary interests.

215. Defendants are undermining the States' efforts to fairly administer their own elections pursuant to the authority vested in them by the Constitution. As a result, Defendants have caused and will continue to cause harm to the States' sovereign interests, which include prescribing the method of selecting their representatives in the federal system to ensure equal sovereignty. In addition to the federal elections, the States will conduct their own statewide and local elections on Election Day. The conduct of state elections, in conformance with the Constitution and federal law, is a central component of State sovereignty.

216. In addition, Defendants' actions will also force the States to devote significant additional resources to administering their elections, harming the States' proprietary interests.

217. Many States will be required to devote additional resources to encouraging voters to return their ballots earlier than otherwise necessary, and will be required to implement

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Newsom passed an executive order, later ratified by the California Legislature, to automatically send mail-in ballots to registered active voters for the November 2020 general election because "[n]o Californian should be forced to risk their health in order to exercise their right to vote." Press Release, *Governor Newsom Issues Executive Order to Protect Public Health by Mailing Every Registered Voter a Ballot Ahead of the November General Election* (May 8, 2020), https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/.

[79] 6ABC, *Pennsylvania boosting efforts to promote voting by mail amid COVID-19 pandemic* (Apr. 22, 2020), https://6abc.com/coronavirus-pennsylvania-reopen-pennsylvnania-one-retailer-customer-stay-at-home/6122146/.

alternate means for voters to submit mail-in ballots, as a result of the delay in mail service caused by Defendants' actions.

218. The delays in mail service caused by Defendants' actions have harmed and will continue to harm the States in other ways. For instance, the States all depend on the operation of the Postal Service to perform essential government functions, including collecting revenue and providing services to their citizens. Delays in mail delivery caused by Defendants' actions thus cause direct harm to the States.

219. Administrative and state judicial systems in each of the States depend on operation of the mail to provide notice to parties and others about proceedings. Delays in mail delivery caused by Defendants' actions have undermined the efficient operation of legal proceedings in the States.

220. State criminal law proceedings also rely on the Postal Service for delivery of important legal documents. Delays in the delivery of mail risk undermining the enforcement of criminal law.

221. The States are also consumers of goods and services and frequently procure and pay for items using the Postal Service. Delays in delivery of goods and payment harm business relationships and deprive the States of the use of items purchased.

CAUSES OF ACTION

COUNT I

Violation of Postal Reorganization Act – 39 U.S.C. § 3661

222. Plaintiffs incorporate by reference the foregoing paragraphs as if they were set forth fully herein.

223. Whenever the Postal Service "determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially

nationwide basis" the Postal Service must first "submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change." 39 U.S.C. § 3661(b). Before the Commission issues an advisory opinion, it must hold a hearing on the record. *Id.* § 3661(c). The public is entitled to submit comments in proceedings before the Commission. 39 C.F.R. § 3010.140.

224. As reflected in the July 10 Stand-Up Talk, the July PPT, letters to Congress, public statements, and internal memorandum, Defendants changed the nature of postal services in July 2020. Defendants adopted new operational policies that, among other things, prohibit late or extra trips by postal workers that are often necessary to keep the mail moving forward in the mailstream, require carriers to adhere rigidly to start and stop times regardless of whether all mail for their route has arrived or been delivered, and limit the use of overtime. As the July 10 Stand-Up Talk concedes, a consequence of the recent changes is that some mail will be "left behind." Before these changes, such results were "not typical." And as Defendant DeJoy concedes, these changes "had unintended consequences that impacted our overall service levels."

225. Defendants' recent changes to postal services have nationwide effect. The changes reflected in the July 10 Stand-Up Take were to be communicated to "[e]very single [Postal Service] employee . . . no matter what job they perform." In subsequent letters to Congress and internal memorandum, the Postal Service has confirmed that the changes documented in the July 10 Stand-Up Talk are part of a nationwide change to the operation of postal services.

226. Despite the recent nationwide changes to the nature of postal services, the Postal Service did not first submit a proposal to the Commission or seek an advisory opinion before

implementing the changes, depriving the public of an opportunity to comment on the changes before they took effect.

227. Because Defendants did not submit a proposal of the recently enacted changes to, or seek an advisory opinion from, the Commission before the changes took effect, Defendants acted beyond their statutory authority and the changes are *ultra vires*.

COUNT II

Violation of Postal Reorganization Act – 39 U.S.C. §§ 101, 403

228. Plaintiffs incorporate by reference the foregoing paragraphs as if they were set forth fully herein.

229. The PRA mandates that it "shall be the responsibility of the Postal Service to maintain an efficient system of collection, sorting, and delivery of the mail nationwide." 39 U.S.C. § 403(b)(1).

230. Under the PRA, the "Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees." 39 U.S.C. § 403(a).

231. When "determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail." 39 U.S.C. § 101(e).

232. As reflected in the July 10 Stand-Up Talk, the July PPT, letters to Congress, public statements, and internal memorandum, Defendants adopted new operational policies in July 2020 that, among other things, prohibit late or extra trips by postal workers that are often necessary to keep the mail moving forward in the mailstream, require carriers to adhere rigidly to start and stop times regardless of whether all mail for their route has arrived or been delivered, and limit the use of overtime. As the July 10 Stand-Up Talk concedes, a consequence of the

recent changes is that some mail will be "left behind." Before these changes, such results were "not typical."

233. As reflected in the Marshall Letters, Defendants intend to abandon their longstanding practice of giving Election Mail the highest priority regardless of the class of mail.

234. The policies adopted by Defendants in July 2020 undermine the Postal Service's "efficient system of collection, sorting, and delivery of the mail nationwide" and fail to "provide adequate and efficient postal services."

235. The policies adopted by Defendants in July 2020 also fail to "give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery" of Election Mail, which is "important letter mail."

236. As a result, Defendants acted beyond their statutory authority and the policy changes are *ultra vires*.

COUNT III

Violations of the Elections Clause – U.S. Constitution, Article I, Section IV, Clause 1 & the Electors Clause – U.S. Constitution, Article II, Section I, Clause II

237. Plaintiffs incorporate by reference the foregoing paragraphs as if they were set forth fully herein.

238. The Constitution's Elections Clause vests authority in the States to regulate the "The Times, Places and Manner of holding Elections for Senators and Representatives" that will represent that State. U.S. Const. art. I, § 4, cl. 1. Only Congress may displace how a State has chosen to regulate the time, place, and manner of a federal election. *Id.*

239. Plaintiffs have exercised their authority under the Elections Clause to allow voters to vote by mail.

240. Congress has not passed any laws that conflict with Plaintiffs' exercise of authority under the Elections Clause.

241. The Constitution's Electors Clause vests authority in the States to appoint "a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const., art. II, § 1, cl. 2.

242. Plaintiffs have exercised their authority under the Electors Clause to appoint their presidential electors based on the results of popular elections and have directed that voters may cast ballots for presidential electors by mail.

243. Plaintiffs have exercised their authority under the Elections Clause and the Electors Clause in reliance on the Postal Service's history of timely delivering Election Mail and treating Election Mail with the highest priority.

244. Defendants have abruptly and unlawfully impaired the operation of the postal services and have acted to cast doubt on the Postal Service's ability to facilitate mail-in voting.

245. As a result, Defendants have interfered with how Plaintiffs have exercised their authority under the Elections Clause and thus violated Plaintiffs' constitutional authority to set the "Times, Places and Manner of holding Elections for Senators and Representatives."

246. Defendants have further interfered with how Plaintiffs have exercised their authority under the Electors Clause and thus violated Plaintiffs' constitutional authority to appoint presidential electors.

COUNT IV

Violation of the 26th Amendment to the U.S. Constitution

247. Plaintiffs incorporate by reference the foregoing paragraphs as if they were set forth fully herein.

248. The 26th Amendment to the U.S. Constitution guarantees that "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

249. Plaintiffs have a sovereign interest in their elected officials best representing the people of the respective States in the federal system, which Plaintiffs accomplish by exercising their constitutional authority over the time, place, and manner of elections to maximize the number of voters, including establishing voting by mail.

250. Defendants' changes to postal services will significantly and disproportionately harm older voters, who are more likely to vote by mail and more at risk of serious harm from COVID-19.

251. Defendants made changes to the nature of postal services in a manner that departed from normal procedure because Defendants did not first submit a proposal of the newly implemented changes to the Commission.

252. Defendants' recently implemented changes are intended to interfere with the Plaintiffs' ability to count votes cast by mail and to make voters in Plaintiff States, especially senior citizens, less willing to vote by mail.

253. Because Defendants have acted in a way that disenfranchises voters on the basis of age, Defendants have violated the 26th Amendment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs requests that this Court enter judgment in their favor and grant the following relief:

a. Declare that the operational and policy changes adopted by Defendants in July 2020—which include prohibiting late or extra trips by postal workers that are often necessary to keep the mail moving forward in the mailstream, requiring carriers to adhere rigidly to start and stop times regardless of whether all mail for their route has arrived or been delivered, limiting the use of overtime, and failing to treat Election Mail with the highest priority—are unlawful;

b. Vacate the operational and policy changes adopted by Defendants in July 2020;

c. Preliminarily and permanently enjoin Defendants from:

   i. Continuing to implement and enforce the operational and policy changes adopted by Defendants in July 2020; failing to rescind these operational and policy changes to the extent they have been implemented; and failing to restore service to the levels provided before the unlawful changes;

   ii. Instituting any changes with a nationwide or substantially nationwide effect on delivery services without first seeking an advisory opinion from the PRC pursuant to 39 U.S.C. § 3661 and seeking public input as required by the statute and by regulation;

   iii. Failing to adhere to the Postal Service's longstanding practice of treating Election Mail with the highest priority and as First-Class Mail regardless of the class of mail;

   iv. Failing to postmark every piece of Election Mail the day it is received by USPS; and

v. Prohibiting overtime, late trips, and extra trips during the week before, day of, and 17 days after the November 2020 general election.

d. Appoint an independent monitor to oversee Defendants' compliance with the terms of the Court's order;

e. Award Plaintiffs reasonable costs, including attorneys' fees; and

f. Grant such other and further relief as the Court deems just and proper.

August 21, 2020

Respectfully submitted,

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**Appearing pro hac vice (applications forthcoming)*

***Appearing pro hac vice (applications pending)*

**** Application for admission forthcoming*

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.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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

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I. INTRODUCTION

The November 3 election is two months away, and the country is in the throes of an unprecedented public health crisis with no end in sight. North Carolina's election officials, like many across the country, are struggling to administer the election in a manner that will provide all eligible voters with the opportunity to safely cast a ballot and have it counted. As requests for absentee ballots skyrocket and counties prepare for unsafe crowds during one-stop early voting, judicial intervention is urgently needed to protect North Carolina voters' fundamental rights.

The North Carolina State Board of Elections ("State Board") itself recognizes the dire threat of the pandemic to the State's electoral processes. Earlier this year, it issued a plea to the Governor and legislative leaders, requesting several critical changes to North Carolina election law, including modifications to make absentee voting safer and more accessible, and to allow county-level flexibility in setting one-stop early voting hours. The General Assembly adopted a half measure that reduced the State's requirement from two absentee ballot witnesses to one and appropriated matching funds to access emergency federal aid. The June 23 primary proved these slight modifications to be insufficient. Consistent with the experiences of election officials across the country, counties were forced to reduce the number of polling locations as venues refused to open their doors to voters and poll workers abandoned their posts out of fear for their health. Those who cast absentee ballots were forced to risk exposure to the virus to comply with the witness requirement, as well as other burdensome restrictions that threatened their fundamental right to vote. In July, the U.S. Postal Service ("USPS") took the astonishing step of sending a letter that expressly warned North Carolina that its laws as currently on the books are "incongruous with the Postal Service's delivery standards," creating "a significant risk" that "ballots may be requested in a manner that is consistent with [North Carolina's] election rules and returned promptly, *and yet*

not be returned in time to be counted." *See* July 30, 2020 USPS Letter, Ex. 1. USPS similarly warned that, under North Carolina's current elections regime, for any number of voters who timely request absentee ballots, "there is a risk that the ballot will not reach the voter before Election Day, and accordingly that the voter will not be able to use the ballot to cast his or her vote." *Id.*

In Governor Cooper's own words, "much more work is needed to ensure everyone's right to vote is protected."[1] Plaintiffs brought this suit to do just that and respectfully ask this Court to promptly enter an injunction in advance of the November election that will:

- Suspend limits on the number of days and hours of one-stop voting that counties may offer, a restriction that currently denies county boards of elections the flexibility to provide adequate early voting options to keep the electorate safe and enable voters to cast an in-person ballot to ensure their ballot is counted;

- Extend the deadline by which absentee ballots must be received to be counted to require election officials to count ballots that are postmarked by Election Day and received by close of business on the day before the county canvass, to ensure that thousands of voters are not disenfranchised by North Carolina's current "incongruous" deadlines as the USPS has explicitly warned they otherwise likely will be;

- Suspend the requirement that absentee ballot envelopes must be signed by a witness for voters who live in a single-adult household, which forces voters to defy recommendations from health experts, the federal government, and the North Carolina government that all residents should practice social distancing and minimize unnecessary contact with individuals outside of the home;[2]

- Require Defendants to provide prepaid postage for absentee ballots and ballot request forms during the pandemic;

- Suspend the restriction prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request form; and

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[1] Press Release, *Governor Cooper Signs Five Bills into Law*, (June 12, 2020), https://governor.nc.gov/news/governor-cooper-signs-five-bills-law.

[2] Plaintiffs' challenge to the witness requirement is an as-applied challenge and thus not affected by the recent ruling in *Chambers v. North Carolina*, Order on Injunc. Relief, File No. 20 CVS 500124 (Gen. Ct. of Justice Wake Cty. Super. Ct. Sept. 3, 2020). Plaintiffs request that the Court permit individuals who live alone to submit a cure affidavit along with their ballots indicating that they did not complete the witness requirement for that reason.

- Suspend the restriction prohibiting voters from receiving assistance from the vast majority of individuals and organizations in delivering their marked and sealed absentee ballot and imposing criminal penalties for providing such assistance.[3]

Individually and collectively, these restrictions burden North Carolina voters by making voting more burdensome, and sometimes inaccessible, even under normal circumstances. Yet, these are not normal times—the unprecedented challenges posed by the pandemic threaten to disenfranchise countless voters unless this Court acts to ensure access to the ballot box. Even worse, the impact of these restrictions is not distributed equally. They will be felt most severely among elderly voters, who are especially vulnerable to COVID-19. And there is mounting evidence that the mortality and infection rates among minority communities far outweigh those groups' share of the State's population. Unless these burdensome impediments to voting are promptly suspended, the result will be the unconstitutional restriction of the exercise of the right

[3] The laws and practices that Plaintiffs challenge in this litigation are laid out in their Complaint, ¶¶ 5, 58-94, 104-22, but briefly are: (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) 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, notwithstanding USPS's well-documented mail delivery delays and operational difficulties, *id.* § 163-231(b)(2) (the "Receipt Deadline"); (3) the requirement that all absentee ballot envelopes must be signed by a witness, despite recommendations from medical professionals and the government that all residents should practice social distancing and minimize unnecessary contact with individuals outside of the home, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (4) the State's failure to provide prepaid postage for absentee ballots and ballot request forms during the pandemic, N.C.G.S. § 163-231(b)(1) (the "Postage Requirement"); (5) 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 (6) 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) (the "Ballot Delivery Ban"). Though it is not encompassed within this motion for preliminary injunction, Plaintiffs preserve their challenge to the arbitrary rejection of 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 (the "Signature Matching Procedures").

to vote and to have free elections, with heightened burdens imposed on North Carolina's minority and elderly communities, subjecting them to disproportionately higher risk of disenfranchisement or illness when they attempt to exercise their most fundamental right.

II. BACKGROUND

A. The pandemic has upended daily life in North Carolina and made it unsafe to vote in person without significant and substantial accommodations.

The COVID-19 pandemic is sweeping through the country, with known domestic infections surpassing 6.1 million and fatalities approaching 186,000. *See* Affidavit of Dr. Catherine Troisi ("Troisi Aff.") ¶ 10 (attached hereto as Ex. 2). As of the date of this filing, North Carolina has more than 170,000 confirmed cases and nearly 2,800 reported deaths from the virus, with cases currently and rapidly increasing. *Id.* ¶¶ 10, 27. The crisis has no end in sight.

In North Carolina, the number of confirmed COVID-19 cases has increased 27% during the last 14 days and the testing positivity rate is at 6%—above the 3-5% goal that would indicate infection is under control. *Id*. ¶ 27. Cases are skyrocketing on North Carolina college campuses as students return for the fall semester; just a week after students returned to campus, the University of North Carolina at Chapel Hill was forced to move entirely back online after more than 130 students tested positive.[4] The latest projections indicate that the spread of COVID-19 infections will persist into the fall and social distancing may be required for the next 18 months, until a vaccine is developed and distributed. Troisi Aff. ¶¶ 22-26. Indeed, the Director of the Centers for Disease Control and Prevention ("CDC") and other experts have cautioned that this fall's wave of

[4] Tammy Grubb & Martha Quillin, *UNC-Chapel Hill moves all classes online after 130 more students infected with COVID-19*, News & Observer (Aug. 17, 2020, 3:33 PM), https://www.newsobserver.com/news/local/education/article245014185.html.

coronavirus may "be even more difficult than the one we just went through."[5] Experts anticipate that the State's case numbers will continue to rise, and COVID-19 will still be present in North Carolina through November. *See* Troisi ¶ 29.

COVID-19 is an infection caused by the novel coronavirus. *See id*. ¶¶ 10-11. It can cause severe illness and death, including from organ failure and cardiac damage. *See id*. ¶ 12. Concerningly, individuals can be infected and show no symptoms, but continue to infect others. *See id.* ¶ 15. Although anyone can be infected with COVID-19 and experience serious outcomes, certain groups are at higher risk of severe illness and death, including those over 65 years of age, pregnant women, and those with a number of preexisting conditions, including asthma, chronic heart disease, diabetes, obesity, chronic kidney disease, and liver disease. *See id.* ¶ 13. A significant portion of North Carolina's population falls into these at-risk categories: 16.7% of residents are 65 or older, 12.5% have diabetes, 23.7% have heart disease, 33% are obese, and 17.4% smoke. *Id.* The virus does not impact all communities equally; racial minorities are significantly more likely to be infected and experience more serious outcomes. *See id.* ¶ 14. For example, in North Carolina, Hispanics comprise just 9.6% of the population but 37% of COVID-19 cases. *Id.* ¶ 28.

North Carolina is currently under a state of emergency and a "Safer at Home" Order issued by the Governor as a result of the pandemic. *See* Exec. Order No. 141, Safer at Home Order, Ex. 3; Exec. Order No. 155, Ex. 4 (extending the Order). The Order, which was extended on August 5, "very strongly encourage[s] . . . people 65 years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes." Exec. Order No. 141, § 2 (emphasis in original). The Order strongly urges all North

[5] Lena Sun, *CDC director warns second wave of coronavirus is likely to be even more devastating*, Wash. Post (Apr. 21, 2020 3:41 PM), https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/.

Carolinians to social distance, wear cloth masks when leaving the home and "in all public settings," carry hand sanitizer, and wash hands frequently. *Id*. Though the Order permits the reopening of certain businesses, it also sets strict limitations for occupancy and social distancing. Masks are also required in many retail spaces. *See* Exec. Order No. 147 § 2, Ex. 5; Exec. Order No. 155 (extending the Order). "Mass gatherings" of more than ten people indoors and 25 people outdoors are prohibited. Exec. Order No. 141, § 7. There are limited exceptions, including for receiving governmental services. *Id.* Members of state government agencies are required to wear masks. *See* Exec. Order No. 147 § 2.

Many North Carolina residents have continued to stay home for fear of the virus's threat to their health including those at high risk for severe outcomes from COVID-19. *See, e.g.*, Affidavit of Rebecca Johnson ("Johnson Aff.") ¶ 3 (attached hereto as Ex. 6); Affidavit of Caren Rabinowitz ("Rabinowitz Aff.") ¶ 5 (attached hereto as Ex. 7); Affidavit of Rosalyn Kociemba ("R. Kociemba Aff.") ¶¶ 4-5 (attached hereto as Ex. 8); Affidavit of Tom Kociemba ("T. Kociemba Aff.") ¶¶ 5-6 (attached hereto as Ex. 9); Affidavit of Lynne Newsome ("Newsome Aff.") ¶ 7 (attached hereto as Ex. 10); Affidavit of Judith Coggins ("Coggins Aff.") ¶ 4 (attached hereto as Ex. 11); Affidavit of Nancy Clark ("Clark Aff.") ¶ 5 (attached hereto as Ex. 12); Affidavit of Margaret Curtis ("Curtis Aff.") ¶ 3 (attached hereto as Ex. 13); Affidavit of Patricia Matos Aguilera ("Matos Aff.") ¶ 4 (attached hereto as Ex. 14). Many government operations are also largely functioning remotely. A recent Order of the Chief Justice of the State Supreme Court "declare[s]" that "catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state," and limits in-person proceedings. Order of the Chief Justice of the Supreme Ct. of N.C., Ex. 15. Some county boards of elections, while functioning, are not permitting the public to enter their doors. *E.g.*, Affidavit of Kristin Scott ("Scott Aff.") ¶ 5 (attached hereto as Ex. 16).

Beyond posing a direct threat to individual and public health, the pandemic has upended elections. Over the last several months, voters across the country (including in North Carolina) have gone to the polls, with often disastrous results. *See* Affidavit of Dr. Kenneth R. Mayer ("Mayer Aff.") at 5-8 (attached hereto as Ex. 17). In Wisconsin, Ohio, Georgia, and Florida, for example, voters clad in masks and gloves waited for hours to cast their ballots due to pandemic-related poll worker shortages and polling place closures that forced election officials to consolidate polling places, cramming thousands of voters into woefully inadequate sites. *Id*. North Carolina's own primary for the 11th Congressional District, delayed to June 23, was plagued with similar problems. As cases surged, planned polling places across the District were unwilling or unable to open their doors to voters and poll workers dropped out due to health concerns. *Id.* at 5.[6]

Earlier this year, the State Board sent letters to Governor Cooper, House Speaker Tim Moore, Senate President Pro Tempore Phil Berger, and several legislative committees, explaining the challenges of conducting an election during the pandemic. State Bd. Mar. 26, 2020 Letter, Ex. 18; State Board Apr. 22, 2020 Letter, Ex. 19. The State Board warned that to protect the franchise, various changes to North Carolina's voting laws and practices were urgently needed, including (1) altering early voting sites and hours requirements to allow counties to better accommodate in-person voters during the pandemic; (2) relaxing or eliminating the Witness Requirement and restrictions on third-party assistance of voters in care facilities; (3) establishing a fund to pay for absentee ballot postage; (4) creating an online option for requesting absentee ballots, and allowing them to be submitted by fax and email; and (5) enabling county boards of elections to assist voters by prefilling their information on absentee ballot request forms. State Bd. Mar. 26, 2020 Letter.

[6] *See, e.g., North Carolina sees record COVID-19 hospitalizations for 4th day in a row, large increase in cases also reported*, ABC11 (June 11, 2020), https://abc11.com/coronavirus-cases-update-us-coronoavirus-usa/6242164/.

Though the State Board urged the General Assembly to make these changes "to address the impacts of the coronavirus pandemic on our elections," the Board further stated that it "believe[s] that, in order to ensure continuity and avoid voter confusing, the changes should be made permanent . . . ." *Id.* at 2; *see also* State Bd. Apr. 22, 2020 Letter (reiterating same recommendations).

Though the General Assembly took *some* of the action requested by the Board, it has fallen far short of addressing what must be done to protect the right to vote. Through recent emergency legislation, the General Assembly, for example, reduced the Witness Requirement from two to one witness. HB 1169, § 1.(a). But this makes little difference for the 1.1 million North Carolinians who live alone and will still need to leave their homes or invite outsiders in to complete the requirement.[7] Mayer Aff. at 10. Plaintiffs agree with Governor Cooper's assessment: "[m]aking sure elections are safe and secure is more important than ever during this pandemic," and "[t]his legislation makes some [ ] positive changes, but much more work is needed to ensure everyone's right to vote is protected."[8]

In November, the risks associated with potential exposure to the virus will remain far too high for many North Carolinians, who should not be forced to choose between exercising their fundamental right to the franchise and protecting their health and welfare. In-person voting, venturing to a post office to obtain stamps, or having to interact in person with a witness to submit

[7] HB 1169 also appropriates state matching funds necessary to access $10 million in federal funds for election-related expenses through the Help America Vote Act ("HAVA") Coronavirus Emergency Fund passed as part of the CARES Act. HB 1169, § 11.1.(a). The law allocates the funds to various efforts, including creating an online portal for absentee ballot requests, mitigating early one-stop voting-related expenses, providing for increased postage costs for sending out mail-in ballots, recruiting poll workers, and recruiting members of multipartisan assistance teams ("MATs"). *Id.* § 11.1.(b)-(d).

[8] Press Release, *supra* note 1.

an absentee ballot all present significant risks that voters should simply not be forced to undertake. *See* Troisi Aff. ¶¶ 2, 21, 31-34. It is well established that increasing direct or indirect costs associated with voting makes it less likely that a voter can ultimately cast a ballot. Mayer Aff. at 4. The risk of contracting COVID-19 infection exacerbates existing costs of voting and places a greater burden itself on voters, burdening those rights severely for the most vulnerable among the population, and so much so that, for many, it will lead to disenfranchisement. *See generally id.*

B. Inadequate in-person voting opportunities.

Because polling places draw large numbers of people into relatively small, enclosed spaces, often causing long lines, in-person voting during the pandemic creates a risk of transmission between voters, poll workers, and election officials. Troisi Aff. ¶ 32. A voter's risk of contracting or transmitting COVID-19 is directly correlated with the density of individuals in one place and the length of time a person stays there. *Id.* ¶¶ 19-21. Voters in certain age and racial minority groups, as well as those with preexisting conditions, are at higher risk of worse outcomes from COVID-19. *Id*. ¶¶ 13-14. Safety measures necessary to mitigate the risk of transmission at polling places include: (1) reducing the number of people present at any given time and reducing the amount of time voters spend there; (2) ensuring that social distancing is strictly enforced among poll workers and voters; and (3) ensuring poll workers and voters are provided and use personal protective equipment, hand sanitizer, and other appropriate disinfecting products. *See id.* ¶ 17. In North Carolina—where officials will not mandate that voters wear masks at polling places or socially distance, *see* Exec. Order No. 141, § 2 (encouraging but not mandating masks); Scott Aff. ¶ 15—reducing the number of people in polling places is critical. A voting schedule that allows counties freedom to offer in-person voters as many options as possible will help prevent overcrowding and allow voters to maintain social distance more easily. Troisi Aff. ¶ 2.

Providing such options is critical because North Carolinians have historically relied on in-person voting, and many will continue to do so in November. Mayer Aff. at 8-9 (Table 1). But unless Plaintiffs' motion is granted, voters will see just the opposite: fewer voting locations and hours, packed polling places, and long lines. *See id*. at 7-8. In the June 23 primary, for example, Haywood County reduced the number of polling sites from 29 to 11, and Macon County consolidated 15 polling sites into just 3.[9] The State Board's Executive Director has expressed concern that COVID-19 could result in polling place consolidation and relocation in November. *See* Recommendations to Address Election-Related Effects of COVID-19, Apr. 7, 2020, Ex. 20. These changes threaten voters' rights to reasonable and safe access to in-person voting.

The State must permit local jurisdictions to offer additional early voting as necessary to provide their voters safe and reasonable access to cast their ballots in person. This will help protect voters from undue burdens and disenfranchisement that would otherwise follow from the reduction in cumulative voting hours caused by the pandemic, as well the risk of congestion at a more limited pool of polling locations staffed by a more limited group of election volunteers, and enable voters to select an early voting day when they can avoid crowds and engage in adequate social distancing. Troisi Aff. ¶¶ 2, 33-34. Without enough early voting options to ensure proper social distancing, many voters will not feel safe to cast their ballots in person. *See, e.g.*, Affidavit of Sandra Malone ("Malone Aff.") ¶ 4 (attached hereto as Ex. 21); Affidavit of Jade Jurek ("Jurek Aff.") ¶ 6 (attached hereto as Ex. 22); Affidavit of Linda Gardner ("Gardner Aff.") ¶ 6 (attached hereto as Ex. 23); Coggins Aff. ¶ 6. County election officials have also expressed as much. Scott Aff. ¶ 16.

[9] Hannah McLeod, *Second primary, voting in the pandemic*, Smoky Mountain News (May 13, 2020), https://www.smokymountainnews.com/archives/item/29083-second-primary-voting-in-the-pandemic.

The State Board's Emergency Order on July 17, 2020, directing county boards to take certain in-person voting measures "calculated to offset the nature and scope of the disruption from the COVID-19 disaster," is not adequate to protect voters' rights. Numbered Memo 2020-14, Ex. 24. First, the Order's requirement that counties open at least one one-stop early voting site per 20,000 registered voters would actually *decrease* the number of early voting locations in a majority of North Carolina counties, as compared to the 2016 general election. Mayer Aff. at 11. Some counties have already released plans showing that they will reduce early voting sites in response. *Id.* at 37-39 (App'x B; showing, for example, that Wilkes County, population 41,597, which hosted 4 and 5 early voting centers in 2012 and 2016, respectively, is now hosting just 2). Indeed, the data on the number of planned early voting centers for the November election, which the State Board has released for some counties, show that the number of centers goes up in only 16 counties, remains the same in 36, and *decreases* in 48. *Id.* at 11, 37-39 (App'x B).

On top of this, the July 17 Order allows county boards to "apply to the Executive Director for a waiver of the [one-center-per-20,000-registered-voters] requirement . . . if its proposed plan is sufficient to serve the voting population, maintain social distancing and reduce the likelihood of long lines." Numbered Memo 2020-14. And it requires only those counties that have one early voting site to arrange for backup sites and staff. *Id.* Despite the State Board's clear recognition that COVID-19 introduces uncertainty into in-person voting processes, its Emergency Order does not allow counties to maintain flexibility over early voting such that they could *expand* the days to vote, even though it does allow them to seek waivers to *reduce* early voting site requirements. Yet, county officials confirm they would prefer the flexibility to expand early voting hours. Scott Aff. ¶ 16.

C. North Carolina's vote-by-mail system threatens to disenfranchise thousands of voters in this year's election.

North Carolina permits all registered voters to cast a ballot by mail. N.C.G.S. § 163-226(a). In the pandemic, for many voters exercising their right to vote by voting by mail is not a choice; it is a necessity without which they will not be able to exercise their constitutional right to vote. The challenged provisions, however, pose unnecessary barriers to casting a mail ballot in North Carolina, and are likely to disenfranchise those who need mail voting most. The impacts are likely to be wide-ranging and severe: historically, the vast majority of North Carolina's electorate has voted in-person, but as elections in the pandemic have already demonstrated, they are quickly shifting to absentee voting in extraordinarily large numbers. But as these voters attempt to acquaint themselves with a new way of voting, the challenged provisions impose significant burdens, including in information costs, the successful navigation of which can be the difference between casting a ballot that gets counted and one that is rejected. Indeed, from 2016 to 2020, among voters who voted by mail for the first time, North Carolina's rejection rate (4.6%) was nearly 1.4 times the rate for voters who had previously cast two or more mail ballots (3.3%). Mayer Aff. at 28.

1. The Receipt Deadline

Under North Carolina law, a mail ballot must be postmarked by Election Day and received no later than three days after Election Day to be counted. N.C.G.S. § 163-231(b)(2) (the "Receipt Deadline"). As a result, North Carolina disenfranchises voters whose ballots arrive after the Deadline—regardless of whether those voters mailed their ballots on or even before Election Day and despite the fact that timely delivery depends on several factors outside of a voter's control. *See* Affidavit of Ronald Stroman ("Stroman Aff.") ¶ 6 (attached hereto as Ex. 25). In fact, in primary and general elections since 2016, the Receipt Deadline has resulted in the rejection of nearly 5,000 mail ballots, even though those elections were conducted under normal non-pandemic conditions in which only a tiny percentage of North Carolinians returned their ballot

by mail, *see* Mayer Aff. (Tables 1 & 2), and USPS was not under the strain it is today, *id.* at 19-20.

As a result of the pandemic, the number of voters utilizing mail ballots in November's election is expected to be *at least* ten times higher than in 2016. *Id*. at 10. This will put an unprecedented strain on the entire system, from local elections officials who must process a record number of absentee ballot requests and ballots, *id.* at 5, to USPS, which must deliver them all to voters and back again, all while dealing with its own significant operating issues that have arisen as a result of the pandemic and profound changes in its administration. *See* Stroman Aff. ¶¶ 6, 9-13.

This is not conjecture: USPS and North Carolina officials alike have admitted that North Carolina voters acting entirely consistent with North Carolina law are nonetheless at serious risk of disenfranchisement from the Receipt Deadline in November. July 30, 2020 USPS Letter; States' Compl., Ex. 26; *see* Stroman Aff. ¶ 11 (noting that North Carolina filed a lawsuit against USPS, challenging the agency's "recent operational and policy changes," which have exacerbated the burdens imposed by the COVID-19 pandemic, resulting in "significant delays in mail delivery across the country" and revealing that "there have been sustained reports of late delivery—by at least two weeks—of mail and packages, including mail and packages that small businesses depend on and medicines for those in rural communities[,]" demonstrating strain already on the existing mail system). In a letter sent by the General Counsel of USPS, Thomas J. Marshall, to North Carolina's Secretary of State Elaine Marshall on July 30, 2020, USPS warned, in no uncertain terms, 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. July 30, 2020 USPS Letter; *see* Stroman Aff. ¶ 12. This mismatch *creates a risk that ballots requested near the deadline*

under state law will not be returned by mail in time to be counted." July 30, 2020 USPS Letter at 1 (emphasis added). USPS was clear 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***." *Id.* at 2 (emphasis added); *see* Stroman Aff. ¶ 12. Specifically, "there is a risk that . . . a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state's receipt deadline of November 6." July 30, 2020 USPS Letter at 2. USPS further warned that, in North Carolina, which permits voters to request absentee ballots up to seven days before an election, "there is a risk that ***the ballot will not reach the voter before Election Day***, *and accordingly that* ***the voter will not be able to use the ballot to cast his or her vote***." *Id.* (emphasis added). USPS noted that this "risk is exacerbated by the fact that the law does not appear to impose a time period by which election officials must transmit a ballot to the voter in response to a request," *id.*, and, indeed, evidence from past elections shows that election officials sometimes wait multiple days to send an absentee ballot after receiving a request, Mayer Aff. at 20. Thus, even North Carolinians who timely request an absentee ballot and who put their ballots in the mail to be returned to elections officials well in advance of Election Day are at risk of being disenfranchised through no fault of their own. Stroman Aff. ¶¶ 13, 16-17 (noting that USPS delivery standards of 2-5 days for First Class Mail are aspirational at best).

And, if this were not enough, there are additional questions about USPS's ability to deliver mail even within the time frames outlined in its July letter. On August 21, North Carolina, along with six other states filed a lawsuit challenging USPS procedural changes that will likely delay election mail even further, exacerbating the already "significant risk" that North Carolina voters will be disenfranchised by North Carolina's relevant deadlines governing voting by mail. States' Compl.; *see* Stroman Aff. ¶ 11. These deeply concerning operational changes include removal of

mail sorting technology and mailboxes, as well as restrictions on timely completion of mail delivery. In fact, earlier this month, seven mail sorting machines were removed without explanation from a mail sorting facility in Charlotte.[10] And there have already been sustained reports of mail and package delays in North Carolina.[11] *See* Stroman Aff. ¶ 11; *see also* Coggins Aff. ¶ 7 (describing USPS delays and package loss during pandemic). Election mail has also been severely impacted by mail delays. Plaintiff Barker Fowler was unable to vote in the March 2020 primary because her absentee ballot arrived *four days after* the primary *despite a postmark date nearly three weeks earlier*. Even though she requested a replacement ballot, that, too, took *weeks* to arrive and came *after* Election Day. Affidavit of Susan Barker Fowler ("Fowler Aff.") ¶ 6 (attached hereto as Ex. 27). Conditions are only worsening: since mid-July there have been sharp decreases in the percentage of USPS mail, sent by any method, delivered on time. USPS Service Performance Measurement PMG Briefing, Aug. 12, 2020, Ex. 28 (noting decreases between 7.97% and 9.57% from the baseline for on-time arrivals); *see also* Stroman Aff. ¶ 17 (noting that because health-care experts have predicted a second wave of COVID-19 in the fall, along with the seasonal flu, staffing shortages could be a significant issue leading up to Election Day).

These burdens do not fall equally. In normal years, ballots sent to voters later in the election cycle and closer to Election Day, are more likely to be rejected as being late, subjecting thousands to disenfranchisement. Mayer Aff. (Figure 2). This is especially true in the final two weeks before an election. *See, e.g.*, *id.*, Figures 2 & 6. This year, because USPS advises voters to submit absentee ballot "request[s] early enough so that [they are] received by their election officials *at least 15*

[10] Austin Weinstein & Brian Murphy, *7 mail sorting machines removed in Charlotte officials say, as protests continue*, Charlotte Observer (Aug. 18, 2020, 2:14 PM), https://www.charlotteobserver.com/news/politics-government/article245030145.html.
[11] Michelle Wolf, *Mail delays hurting local small business owners*, Fox 8 (Aug. 9, 2020, 10:59 AM), https://myfox8.com/news/mail-delays-hurting-local-small-business-owners/.

days before Election Day at a minimum, and preferably long before that time[,]" July 30, 2020 USPS Letter (emphasis added), no North Carolinian who requests a mail ballot *less than two weeks* before Election Day will be able to come close to complying with USPS mailing guidance. Mayer Aff. at 20. The Receipt Deadline thus puts local elections officials and voters seeking to return their ballots by mail in an impossible situation. *See* Stroman Aff. ¶ 17. Voters who are unable to send their ballot well before Election Day, or who wait to cast their ballot so that they may consider late-breaking information in the campaign cycle, are likely to be disenfranchised. *Id.* ¶¶ 13, 16. North Carolinians voting by mail for the first time—of which there are likely to be many in November—are significantly more likely to have their ballots rejected because they arrive after the Deadline. Mayer Aff. at 28. Should the Deadline remain in place, it will disenfranchise thousands in November. *See id.* at 29.[12]

USPS delays across the country during primary elections this year confirm that this is not a speculative concern. In California's recent primary, over 70,000 ballots were rejected for arriving after the state's receipt deadline—and like North Carolina, California accepted ballots up to three days after Election Day.[13] This disturbing trend has been consistent across the country. Georgia rejected 8,459 ballots for being late during its July primary. Mayer Aff. at 7-8. Michigan rejected nearly 6,405 for the same reason during its August primary.[14] In Wisconsin, but for a decision of

[12] Dr. Mayer's projections conservatively rely upon rates of late ballots from prior elections; the rate is likely to be much greater this year given postal delays and a dramatic increase in first-time mail voters. *See* Stroman Aff. ¶¶ 17-20.

[13] Associated Press, *100,000 mail-in votes rejected by election officials in CA's March primary due to late arrival, lack of signature*, KTLA5 (July 13, 2020, 7:34 AM), https://ktla.com/news/california/100000-mail-in-votes-rejected-by-election-officials-in-california-march-primary-due-to-late-arrival-lack-of-signature/.

[14] *Rejected absentee ballot numbers highlight need for legislative changes*, Michigan Secretary of State Jocelyn Benson (Aug. 14, 2020), https://www.michigan.gov/sos/0,4670,7-127--536848--rss,00.html.

the U.S. Supreme Court in litigation brought in anticipation of this very problem—which allowed absentee ballots to count so long as they were postmarked by Election Day and received up to *six* days after Election Day—over 79,000 voters would have been disenfranchised. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1638374, at *17 (W.D. Wis. Apr. 2, 2020), *stayed in part sub nom. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538, 20-1546, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). Even with this extension, Wisconsin rejected over 2,600 ballots that arrived more than six days after Election Day. Mayer Aff. at 5-6. Concerns about these types of systemic problems prompted Ohio's Secretary of State to recently join the chorus of concerned government officials in writing to Ohio's congressional leaders about postal delays in his state:

> As Ohioans rush to submit their vote-by-mail requests, and our boards work overtime to fulfill them, we are finding that the delivery of the mail is taking far longer than what is published by the United States Postal Service (USPS) as expected delivery times. Instead of first-class mail taking 1-3 days for delivery, we have heard wide reports of it taking as long as 7-9 days. As you can imagine, these delays mean it is very possible that many Ohioans who have requested a ballot may not receive it in time.

Id. at 6.

The evidence has become overwhelming that many voters are being disenfranchised due to no fault of their own: election officials are finding themselves unable to keep up with the absentee requests in a timely fashion, and USPS is delayed in delivering election mail. *See* Stroman Aff. ¶¶ 16-17. In Wisconsin's primary, for example, a massive increase in requests for absentee ballots placed a significant strain on election officials and USPS. This resulted in voters *not receiving* absentee ballots in time or in some cases at all (which was the experience of the Minority Leader of the State Assembly). Mayer Aff. at 6. It also resulted in an unusually large number of ballots not returned (including one county where only 1% of one batch of absentee ballots were returned, compared to a 90% return rate for other batches); large numbers of ballots erroneously

sent back to election offices rather than delivered to voters; and bins of undelivered ballots discovered in post office facilities. *Id.*; *see* Stroman Aff. ¶¶ 9-10 (noting tens of thousands of mailed completed ballots arrived at election offices after Election Day, and three tubs of absentee ballots, found at a processing and distribution center after the polls had *already closed*, were *never even mailed* to voters).

It is virtually certain that these same types of delays will lead to disenfranchisement for literally thousands of North Carolina voters who, by no fault of their own, will be unable to receive, cast, and mail their ballot, and guarantee its receipt by the deadline. *See* Scott Aff. ¶ 3 (noting current backlog of applications in Halifax County and concern that "it could take multiple days to process absentee ballot requests and send out absentee ballots"). As of September 1, two months before the general election, North Carolina has already received 591,379 requests for absentee ballots. Mayer Aff. at 10. For comparison, this is more than 16 times the number of applications that had arrived at this point in 2016. *Id.* Moreover, in past years, more than a quarter (26.1%) of North Carolina's requests for absentee ballots were not received by election officials until the final two weeks before Election Day. *Id*. Based on the projections of state officials, at least another *1.2 to 1.7 million applications* will be submitted by North Carolina voters by the October 27 deadline, an average of between 26,000 and 36,000 per day. *Id.* If the 2016 pattern holds for 2020, it would mean that between 475,000 and 600,000 mail ballot applications will arrive at election offices in the last two weeks of the application period—the precise period during which USPS warns voters are at high risk of disenfranchisement resulting from mail delivery issues. *Id.*; July 30, 2020 USPS Letter.

County elections officials confirm that counting mail ballots that come in any time before the canvass, which will take place on November 12 this year, would impose no administrative

burden. Scott Aff. ¶ 6. Indeed, ballots from military and overseas voters are already considered timely if they are transmitted by Election Day and received before close of business on the day before the canvass. In other words, ballots cast by military and overseas voters can be received and counted for an *additional six days* after the receipt deadline imposed on absentee voters in North Carolina in the same election. The same is true for provisional ballots. N.C.G.S. § 163-82.4(f).

2. The Witness Requirement

The Witness Requirement also imposes burdens on voters that are untenable, particularly in the current pandemic. As amended by HB 1169 for the November election, the Witness Requirement requires voters who live alone to find a qualified adult witness from outside their household and complete and sign their absentee ballots in the physical presence of that individual. Mayer Aff. at 10; *see* N.C.G.S. § 163-231(a). 1.1 million North Carolinians live in single-member households, 416,121 of whom are 65 or older and thus at high risk for severe outcomes should they contract COVID-19. *Id*. This number does not include those voters who do not live alone, but also do not live with adults eligible to serve as witnesses under the law.

Finding a witness is burdensome in a normal election; in the current pandemic, it directly threatens the health of voters who have sought to vote by mail precisely to avoid those risks. Voters who live alone must either venture out of self-isolation or invite a third party into their home, at a time when North Carolinians have been ordered to socially distance. To make matters worse, the witness must be physically present for a significant duration of time, including while the voter marks his or her ballot, places it in and seals the return envelope, and affixes his or her own signature to the ballot envelope; the witness must then physically take the envelope from the voter,

transcribe various personal information onto it, and sign it. N.C.G.S. § 163-231(a). These contacts "increase[ ] the possibility of virus transmission." Troisi Aff. ¶ 32.

Because even those who are asymptomatic can transmit the virus, a well-intentioned, seemingly healthy witness poses a risk of unwitting transmission. *Id.* ¶ 21. The same is true of a witness who complies with the CDC's and North Carolina's mask-wearing recommendations. "[C]loth masks" can "offer a certain degree of protection" but they "vary in effectiveness" and "must be worn correctly to offer protection," which cannot be guaranteed. *Id.* ¶ 18. And even if a witness and voter attempt to remain socially distanced, there is increasing evidence that transmission can occur at greater lengths than 6 feet. *Id.* ¶ 19. To make matters worse, a voter can contract the virus through contact with the ballot envelope that his or her witness touched. *Id.* ¶ 31. Because any potential witness, and for that matter, voter, may carry COVID-19, every forced witnessing of a ballot requires North Carolinians to shoulder the risk of contracting the virus—a virus that has already killed 2,683 North Carolinians as of August 29, 2020. *Id.* ¶ 27.

Plaintiff Caren Rabinowitz is one such voter burdened by the Witness Requirement. Ms. Rabinowitz recently moved to North Carolina from New York and lives alone. Rabinowitz Aff. ¶¶ 2, 5. Because she has underlying health conditions that place her at high risk for serious illness if she contracts COVID-19, she plans to vote by mail. *Id.* ¶ 4. To satisfy the Witness Requirement, not only will she have to interact with someone outside of her household to vote, but because she is new to the state, she does not have friends or family nearby who can assist and will have to venture out into the public or invite a stranger into her home. *Id.* ¶¶ 4-5. As a result, the Witness Requirement imposes on Ms. Rabinowitz the same untenable choice as at least a million other North Carolinians: expose herself to the risk of contracting COVID-19 and potentially suffer serious health outcomes or forego her fundamental right to vote. *See* Johnson Aff. ¶¶ 2-3, 5 (73-

year old voter who lives alone and does not have a witness to assist); Affidavit of William Dworkin ("Dworkin Aff.") ¶ 8 (attached hereto as Ex. 29) (many members of the North Carolina Alliance for Retired Americans live alone and do not have easy access to a witness); Curtis Aff. ¶ 4; Clark Aff. ¶ 6. Election officials report receiving concerned calls from voters who are homebound and cannot find a witness. Scott Aff. ¶ 10.

The State Board recognized the severe burdens imposed by the Witness Requirement in the pandemic when it recommended that the General Assembly "[r]educe or eliminate" it in a March 26 letter. State Bd. Mar. 26, 2020 Letter. The State Board explained:

> North Carolina residents are currently being asked to stay at home, and without a timeline for when the disease will be under control, requiring only one witness would reduce the likelihood that a voter would have to go out into the community or invite someone to their [sic] home to have their [sic] ballot witnessed. *Eliminating the witness requirement altogether is another option and would further reduce the risk.*

Id. (emphasis added). In a subsequent letter on April 22, the State Board continued to push for "eliminat[ing] the witness requirement for absentee ballots." State Bd. Apr. 22, 2020 Letter. The Board warned that "[m]ost voters, under current law, would have to invite another adult into [their] home" because they do not live with a sufficient number of potential witnesses. *Id.* In the Board's own words, "[t]his increases the risk of transmission or exposure to disease." *Id.* Health experts agree. Troisi Aff. ¶¶ 21, 31.

Imposing these burdens on voters is even more problematic than it may initially seem, because election officials confirm that the witness signature on a voter's absentee ballot envelope *plays no role* in verifying the voter's identity or confirming whether a ballot is legitimate. Scott Aff. ¶ 10. Election officials have no means of confirming whether the witness was even eligible to sign the ballot, or whether he or she was present when the ballot was marked. *Id.* Nevertheless, the State Board has determined that procedural errors on the part of the witness—like signing on the

wrong line—constitute an uncurable error, disenfranchising the voter. *See* Numbered Memo 2020-19, Ex. 30, § 2.2. As a result, the Witness Requirement forces voters who live alone to risk their health for a procedural requirement that not only serves no purpose, but actually makes it *more* likely that they will be arbitrarily disenfranchised, even if they are able to find someone who will agree to serve as a witness.

3. The Postage Requirement

North Carolina requires voters to provide their own postage for mail ballots. N.C.G.S. § 163-231(b)(1) (requiring vote-by-mail ballots to be "transmitted by mail or by commercial courier service, at the voter's expense") (the "Postage Requirement"). The Postage Requirement imposes both monetary expenses and transaction costs on voting that extend well beyond the price of a stamp. In the midst of an ongoing global pandemic and a suffering economy, the costs of a stamp and the health risks associated with obtaining that stamp are further exacerbated.

A first-class stamp, which is required for mail ballots, costs $0.55. In the 2017 Postal Omnibus Survey, 18-26% of respondents (depending on age group) considered the then $0.49 Forever Stamp to be "expensive." USPS Millennials and the Mail Report, Ex. 31 at 14. Further, for many voters, the $0.55 price of a single stamp does not capture the true cost of securing postage: many do not keep stamps at home and thus must visit a post office or another business that sells stamps risking exposure to COVID-19. Troisi Aff. ¶¶ 2, 21; Fowler Aff. ¶ 8; Affidavit of Sarah Fellman ("Fellman Aff.") ¶¶ 6-7 (attached hereto as Ex. 32). For elderly voters, minority voters, and voters at high risk for serious outcomes from COVID-19, these burdens are significant. Troisi Aff. ¶¶ 13-14, 27-28. Voters may opt to order a book of stamps online, but to do that, they must have internet access, pay $11 plus a service fee, and wait for the stamps themselves to be delivered through an increasingly delayed postal system. Mayer Aff. at 14.

To make matters worse, the postage requirements are far from clear. North Carolina's voters receive conflicting information from numerous sources including the State Board, USPS, county boards, and the news about whether and how much postage is needed. *Id*. at 12. The costs of this conflicting and confusing information are born disproportionately by North Carolinians with less education. *Id.* at 4. These ambiguities create confusion and can drive voters to give up on voting or to make one or more costly—and now dangerous—trips out of their home to try to figure it out. Troisi Aff. ¶¶ 2, 21. Because most North Carolina voters who vote by mail this fall will be doing so for the first time, they are much more likely to be confused. *See* Mayer Aff. at 28. In fact, 94.2% of North Carolinians have never voted by mail. *Id.* Under State Board estimates, that means over 1.5 million North Carolinians will vote by mail for the first time this fall, and many of those voters are unlikely to be familiar with postage requirements. *Id.*

Studies have shown that even seemingly minor expenses can deter action in situations where individuals have a much greater incentive to act; among Medicaid recipients, copays or premiums as low as $1 can deter individuals from seeking medical care. *Id.* at 13. As Dr. Mayer explains: "What is relevant for a comparison to voting is that the potential costs of delaying or avoiding medical care can be vastly greater than the cost of not voting, but small cost burdens—not much more than a stamp—have a measurable effect on behavior." *Id.* Experience confirms these costs prevent voting. Voter participation increases from 4 to 10% when postage is prepaid: "[t]he very fact that turnout increases when absentee ballot return envelopes do not require voters to affix postage confirms that the postage requirement is a barrier for voters." *Id.*

These costs are felt to a greater extent by low-income voters and other marginalized groups. *Id.* at 4. Rates of unemployment have skyrocketed since the pandemic began, and over 1.24 million North Carolinians—almost 30 percent of the workforce—have applied for unemployment benefits

in just five short months.[15] For an increasing number of voters facing these difficult economic circumstances, the cost of a stamp or a book of stamps is significant and heightened. Fowler Aff. ¶ 8. When compounded with the time and costs of transportation to obtain stamps, these costs quickly become insurmountable for many voters. Mayer Aff. at 13.

The State Board recognized these realities earlier this year when it recommended that North Carolina provide prepaid postage for all mail ballots because it would "increase the likelihood that a voter would return [his or her] ballot" and "eliminate the need for a voter to leave [his or her] home to purchase postage" amid an ongoing global pandemic. Mayer Aff. at 13; State Bd. Mar. 26, 2020 Letter; State Bd. Apr. 22, 2020 Letter. The State Board also reasoned that this would "enable residents and patients of facilities such as nursing homes and group homes to return their ballots safely, easily, and with minimal human contact." State Bd. Mar. 26, 2020 Letter at 3. The General Assembly, however, failed to adopt this recommendation; though HB 1169 included appropriations to county boards to cover the cost of mailing absentee ballots *to* voters, legislators failed to provide any funding for prepaid postage on ballot return envelopes. *See* Mayer Aff. at 13.

4. The Application Assistance Ban

To vote absentee, North Carolinians must first obtain and complete an absentee ballot request form. Because of a new restriction this year, only voters, their near relatives or members of county-board-authorized MATs can assist with or submit written requests for absentee ballots.[16] *See* HB 1169, §§ 2.(a), 5; N.C.G.S. § 163-230.2 (the "Application Assistance Ban"). Requests may be submitted by mail, by fax, or in-person. *Id.* As of September 1, 2020, voters or their near relative

[15] Richard Craver, *New unemployment claims at pandemic low in N.C.*, Winston-Salem J. (Aug. 17, 2020), https://journalnow.com/business/new-unemployment-claims-at-pandemic-low-in-n-c/article_ef983184-e095-11ea-be39-97d53b435958.html.

[16] A MAT must consist of at least two registered voters of the county, who represent the two political parties with the highest number of affiliated voters in the State, as determined by January 1 of the current year. HB 1169, § 2.5.(a).

or verifiable legal guardian should be able to submit requests for absentee ballots through an online portal. HB 1169, §§ 7.(a), 7.(d). Because no one other than the above-referenced individuals may assist voters to submit an absentee ballot request, absent an accessible near relative or the help of a MAT member available and willing to endanger his or her own health during the ongoing pandemic, North Carolinians may not even be able to *request* an absentee ballot—let alone receive, complete, and submit their ballot on time.

The Application Assistance Ban was enacted a year after Republican operatives led by Leslie McCrae Dowless engaged in "improprieties . . . and irregularities so pervasive" to corrupt the 2018 general election in North Carolina's Ninth Congressional District. *See* Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District, N.C. State Bd. of Elections, March 13, 2019 ("Order"), at p. 2, Ex. 33. But the prohibitions on third-party assistance in *requesting* ballots would have done nothing to prevent Dowless's fraud and do not serve any state interest in fraud prevention. The State Board found that Dowless engaged in a calculated scheme, carried out over the course of multiple years, involving many individuals and many candidates for office, to "submit forged absentee by mail request forms without voters' knowledge" and collect *unsealed* and *unvoted* absentee ballots—activities which are not regulated by the Application Assistance Ban. *Id.* ¶¶ 46-47, 52, 60, 62-63; *see also* Affidavit of Michael C. Herron ("Herron Aff.") ¶¶ 52, 104-06, 108, 121-22 (attached hereto as Ex. 34) (noting "the improprieties that, per the North Carolina State Board of Elections, occurred in Bladen and Robeson Counties in the 2018 midterm election are not of the type most associated with public concerns about election fraud"). Rather than address Dowless's forgery and impersonation of voters, the Ban takes aim at *non-fraudulent* activities that help ensure that voters are able to vote. In doing so, the Ban acts to prevent lawful voters, including among the very communities who

were disenfranchised by Dowless's scheme, from receiving assistance. Herron Aff. ¶¶ 19-20.[17] Indeed, county boards of elections agree that restrictions on who can return a ballot request form do not serve to detect or prevent fraud, and certainly not the type of fraud in which Dowless engaged. *See* Scott Aff. ¶ 12.

North Carolina's projected increase in absentee voting this year reinforces the need for the State to permit third-party assistance of voters with the electoral process. *See* Mayer Aff. at 1. Nearly 95% of voters who will be voting absentee this year will be voting by mail for the first time, navigating an unfamiliar process in the midst of a global pandemic. *Id.* at 28; *see also* Affidavit of Brett Clarke ("Clarke Aff.") ¶ 4 (attached hereto as Ex. 35).

MATs, which are supposed to partially fill this need by helping voters obtain and complete absentee ballot requests, are not able to do so in much of the State. For November, because of the pandemic, some county boards cannot expand the availability of MATs and will in fact have fewer MATs available than in past elections. Scott Aff. ¶ 11. Many existing MAT members are hesitant to assist due to the pandemic, and many who have previously served on MATs are refusing to do so this year. *Id.*

Other organizations' assistance activities are also being burdened by the Ban. VoteByMail.io, a non-partisan, volunteer-created website, which aims to help registered voters sign up for mail-in ballots, was developed to simplify the absentee ballot request process for voters. Clarke Aff. ¶¶ 3-4. But recently, VoteByMail.io learned that a Wake County voter's ballot request

[17] It is also worth noting that Dowless's criminal conduct—fraudulent completion and signing of blank absentee request forms and absentee ballots to pad vote totals for Dowless's client—was uncovered and corrected before the Ban existed. Herron Aff. ¶¶ 100, 102. Likewise, criminal charges have been brought against Dowless, based on statutes that existed long before the Application Assistance Ban was enacted. Thus, the Ban is clearly not necessary to prevent such fraud.

was rejected because "[a] request form returned using an email address associated with a website is invalid because it was not 'returned' by the voter[,]" even though the voter entered all of the requested information to obtain an absentee ballot. *Id.* ¶¶ 5-6, 9; *see* Ex. A thereto.

In a time when a breathtaking number of North Carolinians are anticipated to turn to absentee voting to exercise their most fundamental right, forbidding third-party assistance with navigating the absentee ballot application process is particularly problematic. Restrictions on the process for obtaining absentee ballots are especially problematic. Without that much needed assistance, countless voters who are attempting to navigate this process will inevitably make mistakes they would not have made had they had guidance, and may restart the application process multiple times, limiting the time frame they have to cast their ballot and ensure its timely delivery to their county board of elections—or even give up on voting all together. Mayer Aff. at 10. Even worse, the Ban's prohibition on third-party assistance could result in voters making mistakes on their absentee ballot return materials, leading to large-scale disenfranchisement. *Id.* at 6, 28-29.

5. The Ballot Delivery Ban

North Carolina imposes strict limitations on how absentee ballots may be returned to county boards of elections. They may only be returned by mail "at the voter's expense," or by in-person delivery by the voter or the voter's near relative or verifiable legal guardian. N.C.G.S. §§ 163-229(b), 163-231(a)-(b); HB 1169 § 1.(a). It is a felony for anyone else to return absentee ballots on behalf of a voter. *Id.*; N.C.G.S. § 163-226.3(a)(5) ("Ballot Delivery Ban").

As discussed, North Carolina is already experiencing severe processing and mail delays that will only be exacerbated in the November election. Even if voters timely receive their absentee ballots, they still risk their ballots being delayed on their return trip and not arriving in time to be counted. *See* N.C.G.S. § 163-231(b)(1), (2)(b). Third-party assistance with ballot delivery

alleviates these burdens that will otherwise disenfranchise voters. Thus, voters are presented with an unconscionable decision: risk their health to vote or stay home.

Ultimately, for voters who have previously cast their ballots in person, changing how they exercise this fundamental right imposes its own set of transaction costs: voters must digest new (and complicated) information, including how to request the ballot and timely deliver it, so that their vote counts. Mayer Aff. at 10. In comparison to voters who vote in person, absentee voters are 400 times more likely to have their ballot rejected than in-person voters due to mistakes. *Id.* at 15. The Ballot Delivery Ban forbids assistance that could prevent such mistakes and disenfranchisement. Were third parties permitted to collect and return these voters' marked and sealed absentee ballots, the possibility of such errors would be reduced.

Dowless's conspiracy is not a reason to impose these additional hurdles to voting, particularly during the pandemic. The Ballot Delivery Ban was in effect when Dowless and his associates perpetrated fraud against North Carolina voters, and yet it failed to serve as a deterrence. Moreover, as discussed above, Dowless's scheme did not involve returning *marked* and *sealed* ballots, but rather forgery and other deceptive practices that are criminalized under other provisions. And in Arizona, Montana, and Wisconsin—states in which third parties are permitted to assist voters in returning their absentee ballots—there have been no instances of significant voter fraud involving absentee voting or voter assistance, and no evidence linking these states' voter assistance laws to systemic voter fraud based on a study of instances of voter fraud from 2012 to 2020. Herron Aff. ¶¶ 203-06. In fact, during this time period, Arizona and Montana changed their voter assistance laws to ban third-party collection of absentee ballots, and there is no evidence that these newly-imposed restrictions on voter assistance lessened or in any way affected rates of voter fraud. *Id.* ¶ 204. Indeed, county elections officials agree that restricting who

can return an absentee ballot does not prevent the type of fraud in which Dowless engaged. *See* Scott Aff. ¶ 12.[18]

III. LEGAL STANDARD

Plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits and (2) they will "'sustain irreparable loss unless the injunction is issued [and] . . . issuance is necessary for the protection of [Plaintiffs'] rights during the course of litigation.'" *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856-57 (1990) (quoting *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *Holmes v. Moore*, 840 S.E.2d 244, 266 (N.C. App. 2020) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LWV*")). In balancing the equities, a court must "weigh[ ] potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). Here, the balance of equities weighs strongly in favor of protecting the fundamental rights of plaintiffs and countless other North Carolina voters.

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs challenge the constitutionality of (1) limitations on expanding early voting, (2) the Receipt Deadline as imposed on voters who use USPS, (3) the Witness Requirement for voters who live in single-adult households, (4) the Postage Requirement, (5) the Application

[18] For ballots that are mailed, there is no way for county elections officials to confirm it was the voter or an authorized person who placed the ballot in the mail. *See* Scott Aff. ¶ 12. For ballots that are returned in person, county elections officials do not verify the identity of the person dropping off the ballots. *See Id.*

Assistance Ban, and (6) the Ballot Delivery Ban, in the context of the ongoing pandemic, which will continue through the November election. *See* Troisi Aff. ¶ 29. Individually and collectively, the challenged provisions impose barriers to voting that make it more difficult for voters to cast their ballots, and will have the effect of disenfranchising thousands of eligible voters. *See* Mayer Aff. at 4. Because no countervailing state interest justifies these burdens, Plaintiffs are likely to succeed on the merits.

1. The challenged provisions, as applied to the upcoming election, violate the Equal Protection, Freedom of Speech, and Freedom of Assembly Clauses of the North Carolina Constitution.

As applied to the ongoing pandemic and to particular groups of individuals, the challenged provisions—individually and collectively—unconstitutionally burden the right to vote. The North Carolina Constitution guarantees citizens the right to equal protection of the laws, N.C. Const. art. I, § 19, the violation of which must be reviewed under strict scrutiny if it "affects the exercise of a fundamental right." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). The same level of scrutiny applies to violations of the Freedom of Speech and Freedom of Assembly Clauses, which provide that the "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained," N.C. Const. art. I, § 14, and "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." *Id.* § 12. "Voting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression" through which citizens not only "express[ ] support for a candidate" but also "band[ ] together with likeminded citizens in a political party" and thus engage in a "form of protected association." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *119-20 (N.C. Super. Ct. Sept. 3, 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020). Accordingly, North Carolina courts

have recognized that laws burdening such protected expressive and associative conduct are "subject to strict scrutiny." *Id*. at *121.

Because Plaintiffs' claims implicate the fundamental right to vote on equal terms, and the challenged provisions burden constitutionally-protected speech and political association, strict scrutiny applies. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (applying strict scrutiny because "[i]t is well settled in this State that the right to vote on equal terms is a fundamental right." (citation omitted), *stay denied*, 535 U.S. 1301 (2002)). To pass strict scrutiny, "the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012). But even if the Court applies the balancing test adopted by federal courts when examining constitutional challenges to voting restrictions, *see, e.g.*, *Parson v. Alcorn*, 157 F. Supp. 3d 479, 492 n.20 (E.D. Va. 2016), Plaintiffs would still prevail because the challenged provisions severely burden their constitutional rights, yet fail to advance sufficient legitimate state interests that would justify these burdens.

a. The challenged provisions severely burden the right to vote during the COVID-19 pandemic.

The challenged provisions, individually and together, impose significant hurdles on North Carolinians' exercise of the franchise, especially during an unprecedented pandemic. The urgency of Plaintiffs' requested relief has been further heightened by a USPS on the brink of crisis.

First, USPS has warned North Carolina that the Receipt Deadline poses a substantial risk of disenfranchising countless voters who request their ballots within the time permitted under North Carolina law and "promptly" return them. July 30, 2020, USPS Letter; *see* Stroman Aff. ¶¶ 14-17. This is true even if the delay was entirely outside of the voter's control. *See id.* Even before the onset of the pandemic, when very few North Carolinians cast their votes by mail,

thousands of otherwise eligible absentee ballots were rejected each year for late arrival. Mayer Aff. at 15-16 (Table 2). Based on the projections of state officials, the number of mail absentee ballots cast this November will be in the range of 1.8 million to 2.3 million; if past trends hold, that means that tens of thousands of ballots will be rejected for arriving late. *Id.* at 29. Because of the current state of USPS, this number is likely to be far higher.

As more voters turn to absentee voting and mail delays only grow, courts are recognizing that receipt deadlines must be enjoined, and states are being ordered to accept—and count—ballots mailed by Election Day to prevent widespread disenfranchisement. *See* Stroman Aff. ¶¶ 13-14. For example, the U.S. Supreme Court recently affirmed a federal district court's decision in Wisconsin to extend an election-day receipt deadline by six days, saving the votes of nearly 80,000 citizens who cast valid ballots that were postmarked on or before Election Day but arrived in the days following due to delayed mail service. *See Bostelmann*, 2020 WL 1638374, at *17. The Supreme Court expressed no concerns about "afford[ing] Wisconsin voters several extra days in which to mail their absentee ballots," so long as those ballots were "postmarked by election day." 140 S. Ct. at 1206; *see also Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020) (Ex. 36), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt deadline and recognizing that such a deadline is likely to disenfranchise thousands of voters); Order at 25, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. Aug. 3, 2020) (Ex. 37) (entering consent decree extending Minnesota's receipt deadline). That is precisely the sort of "postmark" rule Plaintiffs seek here.[19]

[19] "Postmark" refers to any type of imprint applied by USPS to indicate the location and date it accepts custody of a piece of mail, including barcodes, circular stamps, or other tracking marks, and, where a ballot does not bear a postmark, requires the State to presume the ballot was mailed on or before Election Day unless the preponderance of evidence demonstrates otherwise. At least

Second, the Witness Requirement mandates that even voters in single-adult households, like Plaintiffs Rabinowitz and Johnson and the Alliance's members, complete their absentee ballots in the physical presence of a qualified adult witness. *See* Rabinowitz Aff. ¶ 5; Johnson Aff. ¶ 5; Dworkin Aff. ¶ 8; Curtis Aff. ¶ 4; Clark Aff. ¶ 6. At a time when interacting with individuals outside of one's household can pose the risk of contracting a highly contagious and dangerous virus, the Witness Requirement forces over a million North Carolinians to choose between protecting their health and exercising their right to vote. The State Board itself admitted in April that the Witness Requirement "increases the risk of transmission or exposure to disease." *Supra* at 21. Since then, the rate of new COVID-19 cases in North Carolina has only increased. Troisi Aff. ¶ 10. One way the virus can be transmitted is by touching an environmental surface, like a ballot envelope, that is contaminated by the virus. *Id.* ¶¶ 11, 31. Moreover, "there is increasing evidence . . . that aerosolized droplets . . . can spread the virus" to individuals over 15 feet away, and that aerosols may play a more important role in transmission than droplets. *Id.* ¶ 11.[20] Indeed, numerous courts have recognized the unjustifiable burdens that witness and notarization requirements place on voters, enjoining or modifying those requirements for at least the duration of the pandemic—exactly the relief Plaintiffs seek here.[21]

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10 other states and D.C. follow a "postmark" rule (or close variant) that allows ballots arriving at least 5 days following an election to be counted so long as they are timely postmarked. *See* Nat'l Conference of State Legislatures, *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, (Aug. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

[20] The determination in *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020)—that the Witness Requirement does not unduly burden even high-risk voters—was premised on a misconceived finding that COVID-19 cannot spread during voter-witness interactions. *See* Troisi Aff. ¶¶ 11, 19.

[21] *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) ("Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.") (denying motion to stay consent judgment and decree

Third, the Postage Requirement adds a literal cost to voting, which bears most heavily on economically vulnerable voters, including those who are affected by the devastating economic impact of the ongoing public health emergency. Purchasing stamps online can cost voters more than $11, *see* Mayer Aff. at 14—an unnecessary expense that can be cost prohibitive particularly for financially vulnerable individuals, some of whom are among the 1.24 million North Carolinians whose employment and source of income were eliminated due to the devastating economic impact of the pandemic.[22] Even the cost of a single stamp can be prohibitive for many. *Id.* at 12-13. Beyond the monetary costs, the Postage Requirement imposes other ancillary burdens on voters. In this digital era, many voters, like Plaintiff Barker Fowler, do not regularly keep postage stamps in their homes. Fowler Aff. ¶ 8; *see* Fellman Aff. ¶¶ 6-7. For others, a trip to the post office (or anywhere else that sells stamps) during the present crisis forces them to expose themselves to health risks and incur other transactional costs in order to vote. Mayer Aff. at 14. Finally, even if a voter has postage, mailing his or her ballot may still necessitate a trip to the post office to weigh the envelope and determine the proper amount of postage to affix, which again imposes potentially severe risks. *Id*. at 12.

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suspending "notary or two-witness requirement" for mail ballots), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 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 witnessing 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); *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" 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) ("The Constitution does not permit a state to force" voters to choose "between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election.").

[22] *See* Craver, *supra* note 15.

Fourth, the Application Assistance Ban severely diminishes voters' options for requesting absentee ballots, despite that most absentee voters will be voting this way for the very first time because of the ongoing pandemic. Already, as a direct result of the Application Assistance Ban, 80,000 absentee ballot request forms in the State have been recalled because voters' names and addresses were prepopulated.[23] And some voters' absentee ballot request forms have been rejected simply because they used third-party websites to personally fill their application. *See* Clarke Aff. ¶ 6. Moreover, countless voters who are unfamiliar with the absentee voting process are barred from receiving assistance in filling out or delivering the form from anyone other than MATs, which will not be made available to everyone who needs assistance this year. *See* Scott Aff. ¶ 11. By prohibiting trusted organizations and widely accepted platforms like VoteByMail.io, which merely streamlines information and forms for voters, from providing their services—and in the process, ensuring that request forms are properly filled out—the State has unnecessarily cut off an important avenue of assistance for voters. *See generally* Clarke Aff.

Fifth, the Ballot Delivery Ban imposes an undue burden on voters' ability to ensure safe and timely delivery of their absentee ballot. The Ban erects another barrier to absentee voting for those without access to postage; to voters seeking to avoid the uncertainty of mail delivery and the risk of disenfranchisement imposed by the Receipt Deadline; to voters who do not have access to reliable transportation to polling places or county boards; to voters who are concerned about the health risks of in-person voting and do not have an immediate family member available to assist them in submitting their ballot; and to voters whose ballots arrive too late to return by mail. This assistance is critical for such voters and those who are at high risk of contracting COVID-19, like

[23] Press Release, *Advocacy Group Sends Invalid Absentee Ballot Request Forms to 80,000 Voters*, North Carolina State Board of Elections (June 11, 2020), https://www.ncsbe.gov/news/press-releases/2020/06/11/advocacy-group-sends-invalid-absentee-ballot-request-forms-80000.

Plaintiffs Tom and Rosalyn Kociemba, *see* T. Kociemba Aff. ¶ 7; R. Kociemba ¶ 6; *see also* Coggins Aff. ¶ 8; Curtis Aff. ¶ 6, as other courts have recognized. *See DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785 (Minn. Dist. Ct. July 28, 2020) (finding Minnesota's voter assistance ban imposed undue burden on right to vote); *Driscoll*, No. DV 20-408 (finding Montana's voter assistance ban imposed undue burden on right to vote); *W. Native Voice v. Stapleton*, No. DV-2020-377 (Mont. Dist. Ct. May 20, 2020) (Ex. 38) (same).

Sixth, limitations on the number of days and hours of early voting that counties may offer burdens in-person voting. The COVID-19 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. Many voters like Plaintiffs Jade Jurek and Sandra Malone are committed to voting in person and without flexibility for counties to extend additional early voting hours, voters like them will be forced to vote in crowded polling places, risking their health in order to cast their votes. *See* Jurek Aff. ¶ 6; Malone Aff. ¶ 4.

Finally, the combination of the challenged provisions places a more severe burden than any single provision alone. For example, voters who, like many of the Alliance's members, do not have family members available to assist them and are practicing strict social distancing, must *either* risk their health to procure postage and still face the uncertainty of USPS's delays *or* risk their health to personally deliver their ballot or vote in person. *See generally* Dworkin Aff. This is not to mention that some voters have no access to transportation or option to leave their homes at all.

Even before the onset of the ongoing pandemic, North Carolina rejected thousands of ballots a year for being late or lacking a witness signature. Mayer Aff. at 15-16. It is difficult to quantify how many *more* voters did not even return their ballot because they could not find a

witness, lacked postage, or did not receive their absentee ballot in time to deliver it without assistance, but if past rates hold, which are likely drastic underestimates, at least tens of thousands of North Carolinians will be disenfranchised. *Id.* at 29. This year, for the first time, many would-be absentee voters may not even *receive* an absentee ballot because they cannot seek assistance in requesting one. And, given that the November election is taking place within the context of a continued public health crisis and mail delays, the number of unreturned and rejected ballots will only go up, as evidenced by large numbers of rejected ballots in primaries this year across the country. Those numbers will not even tell the whole story: whereas, in the past, the vast majority of North Carolinians chose to vote in person, this year, those who would prefer to do so in the first place *and* those who would be forced to do so because they run into barriers with the absentee voting process, may be unwilling to put their health at risk at crowded voting sites and will thus be forced to forego their fundamental right to vote.

The reality described above—which is the reality Plaintiffs and all North Carolina voters face in just two months' time—is constitutionally inexcusable. "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes *the right to have the ballot counted*." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (emphasis added) (citation omitted). As applied to certain voters and in the context of the pandemic, the challenged provisions prevent eligible voters from having a reliable path to cast a vote. *See Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("[T]he right to vote is personal and is not defeated by the fact that 99% of other people" are not seriously impacted.), *aff'd in part, vacated in part, rev'd in part by Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *cf. Luft*, 963 F.3d at 677, 678-79 (holding "each eligible person must have a path to cast a vote[,]" which requires State to "ensure[ ] that every eligible voter can" comply with law with reasonable effort

as part of a "*reliably implemented*" process).[24] Indeed, "[i]f disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then [it is not clear] what does." *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016).

b. No state interest justifies the challenged provisions, as applied to the upcoming November election.

To pass strict scrutiny, "the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest." *Hest Techs., Inc.*, 366 N.C. at 298. The challenged provisions are not narrowly tailored to achieve a compelling government interest because State Defendants cannot "identify an actual problem in need of solving," nor can they "demonstrate with clarity that [their] purpose or interest is both constitutionally permissible and substantial." *State v. Bishop*, 368 N.C. 869, 877, 787 S.E.2d 814, 819 (2016) (citations omitted).

While the State may point to an interest in the orderly administration of elections, imposing a Receipt Deadline of mailed absentee ballots does little to advance that interest, nor would counting ballots mailed by Election Day and received more than three days after the election interfere with the State's ability to count votes and certify elections. In fact, election officials are already required and frequently called upon to count ballots submitted or finalized well after Election Day: North Carolina voters who submit provisional ballots may provide supporting documentation up until close of business on the day before the county canvass, which cannot occur before 11:00 a.m. on the tenth day after an election to have their ballots counted, *see* N.C.G.S.

[24] These burdens are not be distributed equally, but fall disproportionately on lower income voters, students, minorities, those over 65, and those with other high-risk factors for COVID-19. *See* Mayer Aff. at 4-5; Troisi Aff. ¶¶ 13–14, 28.

§ 163-82.4(f), and military and overseas voters are considered timely if they are transmitted by Election Day and received before close of business on the day before the county canvass, *see* N.C.G.S. § 163-258.12(b). Indeed, the election officials who would count these ballots confirm that doing so prior to the canvass would impose no burden on their operations. *See* Scott Aff. ¶ 6 (explaining county board would have no issue counting a ballot that arrives any time before the canvass on November 12). In any event, the prospect of counting more ballots cannot justify the arbitrary disenfranchisement caused by the receipt deadline. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (holding "administrative convenience" cannot justify the deprivation of a constitutional right); *see also Bostelmann*, 2020 WL 1638374, at *12, n.14.

The Court should also reject any attempt to invoke general interests in fraud prevention to justify any of the challenged provisions—particularly the Witness Requirement, Application Assistance Ban, and Ballot Delivery Ban. None of these restrictions target or combat voter fraud, nor do they address Dowless's criminal scheme in NC-9 in 2018.[25] As detailed above and in the expert report of Dr. Herron, Dowless and his associates did not legitimately assist voters requesting absentee ballots or deliver signed and sealed ballots to county boards on behalf of eligible voters, as Plaintiffs request be permitted. Instead, Dowless coordinated the widespread forgery of absentee ballots—actions which were already prohibited by other criminal laws. *See* N.C.G.S § 163-237(d) (criminalizing fraud in connection with absentee ballots, first adopted as An Act to Amend Certain

[25] Indeed, voter fraud is characterized by (a) improperly acquiring and then submitting an absentee ballot or ballots; (b) voting more than once in an election where this is not permitted; (c) improper actions taken by election officials intended to change validly cast votes, or actions taken to affect voter registration records; (d) participating in a federal election when one is not a U.S. citizen; (e) registering to vote where a person is not a resident; and (f) voting in-person (as opposed to via mail) on an election day in someone else's name, either in the name of a properly registered voter or using the registration records of a fictional individual—not by validly signing his or her ballot affidavit or requesting and returning a ballot *with the permission of the voter*. Herron Aff. ¶¶ 15, 19-20.

Sections of the Election Law of the State, ch. 164, § 40, 1929 N.C. Sess. Laws 180, 201). The enjoinment of these provisions would not engender the activities of Dowless's felonious plot to "obstruct public and legal justice," because none of those laws address Dowless's criminal conduct. Herron Aff. ¶¶ 19-20, 109. And neither the Witness Requirement nor the Ballot Delivery Ban, both of which were in place long before Dowless perpetrated his fraudulent scheme, deterred Dowless's scheme. Moreover, that coordinated criminal conspiracy provides no insight into actual voter fraud, and it is well-documented that the rates of voter fraud, including absentee voter fraud, in American elections are extremely low. *Id.* ¶¶ 26-54. County election officials have themselves confirmed that the Witness Requirement plays no role in their verification process for absentee ballots. *See* Scott Aff. ¶ 10. They likewise confirm that the Absentee Assistance Ban and the Ballot Delivery Ban do not deter or prevent potential voter fraud. *Id.* ¶¶ 12-14.

Notably, North Carolina is one of only five states that imposes a witness requirement, and it does not impose the same Witness Requirement on military or overseas voters registered in North Carolina who vote by absentee ballot. And the State Board's March 26 memo recommended "eliminating the witness requirement altogether," which suggests that the State itself recognizes that the Witness Requirement serves no legitimate interest. State Bd. Mar. 26, 2020 Letter.

Finally, State Defendants can offer no justification for failing to provide prepaid postage on ballots or preventing counties from expanding early vote days and hours. HB 1169 itself allocates federal and state funds for one-stop early voting and postage costs. Moreover, any interest in uniformity across counties or preventing voter confusion is undermined by the State Board's own procedures for certain counties to receive waivers for other statewide requirements—like maintaining at least one site per 20,000 registered voters and offering at least 10 hours at each site

during the two early voting weekends. Numbered Memo 2020-14. And again, the State Board already made these exact recommendations. State Bd. Mar. 26, 2020 Letter.

c. The challenged provisions, as applied to the upcoming November election, likewise fail to pass constitutional muster under *Anderson-Burdick*.

The challenged provisions cannot satisfy strict scrutiny, as demonstrated above, nor would they survive the *Anderson-Burdick* balancing test applied by federal courts and some state courts. This is because the added costs they impose on voting during the pandemic, and the resulting burden on voters, far outweigh (and cannot be justified by) any conceivable governmental interest.

In *Libertarian Party of North Carolina v. State*, the North Carolina Supreme Court adopted a balancing test in examining the constitutionality of ballot access laws, which were challenged under the State Constitution's Free Speech, Free Assembly, and Equal Protection Clauses. 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011). The Court explained that strict scrutiny applies when the "associational right is severely burdened," *id*. at 205, but recognized that even laws imposing less than severe burdens must still "'be sufficiently weighty to justify the limitation imposed on the party's rights,'" *id*. at 206 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). This framework is analogous to the one federal courts apply, developed in the U.S. Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). These courts "weigh 'the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Under this framework, even state regulations that do not impose "severe" burdens on the fundamental right to vote are subject to exacting forms of scrutiny, requiring the state to "articulate specific, rather than abstract state

interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545-46 (6th Cir.), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also Guare v. State*, 167 N.H. 658, 665, 117 A.3d 731, 739 (2015). In fact, even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio State Conf. of N.A.A.C.P.*, 768 F.3d at 538 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.)).

Given that the protections afforded to the right to vote under the North Carolina Constitution are more expansive than those of the U.S. Constitution, *see Common Cause*, 2019 WL 4569584, at *113, state laws that implicate this fundamental right should receive no less scrutiny—and in fact are entitled to *more*. Weighed against the burdens imposed the challenged provisions, any potential justifications are neither precise nor sufficiently weighty to justify the injury to voters, even under an *Anderson-Burdick/Libertarian Party* balancing test.

2. The challenged procedures deny Plaintiffs their constitutional right to participate in a free and equal election.

The State's failure to provide safe, accessible, and reliable means for its citizens to access the franchise during the November election, both in person and by mail, denies Plaintiffs, the Alliance and its members, and all North Carolinians their constitutional rights under the Free Elections Clause. N.C. Const. art. I, § 10 ("All elections shall be free"). As the North Carolina Supreme Court has long recognized, "[o]ur government is founded on the will of the people," and "[t]heir will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). Accordingly, "the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *110. The North Carolina Supreme Court articulated this principle more than a

century ago. *See Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915) ("[T]he object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters."). For this reason, "all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will." *Common Cause*, 2019 WL 4569584, at *109 (same).

The Free Elections Clause is one of the clauses that makes the North Carolina "Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Common Cause*, 2019 WL 4569584, at *109; *see also Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Since its adoption in 1776, North Carolina has twice "broadened and strengthened" the Free Elections Clause, most recently to add mandatory language to "make it clear that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights are commands and not mere admonitions." *Common Cause*, 2019 WL 4569584, at *111 (citation omitted).

The constitutional obligation to ensure that elections are both free and fair and reflect the will of the people, at a minimum, requires that the State ensure that all North Carolinians have a reasonable opportunity to vote. That is, North Carolinians must both have the opportunity to cast their ballots and have their ballots counted, without undue risk to their health and safety. This means the State has an obligation under the Free Elections Clause to ensure that each step of the voting process, whether by mail or in person, does not unnecessarily endanger voters' health, subject voters to a significant risk of arbitrary disenfranchisement, or force voters to choose between exercising their fundamental right to vote and safeguarding their health and the health of their communities. But each of the challenged provisions on their own and together violate this guarantee and absent court intervention, they will obfuscate the will of the people in November.

The burdens imposed by the challenged provisions, as explained *supra* Section IV(A)(1)(a), are severe and restrict voters' ability to participate freely and fairly in the general election. For example, voters who choose to go to the polls must endure the health risks posed by packing more voters and poll workers into fewer voting sites, for a fixed number of voting days and hours. The same is true for absentee voters, as explained *supra* Section II(B). To complete the burdensome, multi-step process of absentee voting, voters must repeatedly expose themselves to the risk of COVID-19, including to obtain stamps, mail their ballots, and have a witness observe the marking of their ballot. And in many instances, as a result of events outside of a voter's control, for example, voters, who through no fault of their own, receive their absentee ballots close to the election, are left between a rock and a hard place. They must either risk their health or forgo their right to participate in democracy. And one way to alleviate many of these challenges—allowing neighbors, friends, and community organizations to step in and assist voters in delivering their absentee ballot requests and ballots—is yet again foreclosed by the State's restrictions. By forcing North Carolinians to make such unconscionable decisions, the State fails in its constitutional duty to provide its citizens with a free election. N.C. Const. art. I, § 10.

Moreover, even if voters complete all of the burdensome steps to mail their ballots, as a result of USPS service delays and disruptions, the receipt deadline will disenfranchise countless voters who lawfully cast their ballots on or before Election Day—for reasons entirely outside their control. The evidence is clear, and it is not a question of whether lawfully-cast ballots will not arrive in time for counting; it is a question of how many voters will be disenfranchised as a result. Indeed, North Carolina itself is currently suing the USPS over fears of election mail delays. This widespread and arbitrary risk of disenfranchisement makes it impossible to "ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *109. At bottom, an

election that subjects voters to unduly burdensome restrictions, health risks, and outright disenfranchisement at every turn is by definition not "free." N.C. Const. art. I, § 10.

Each of these challenged provisions restricts North Carolinians' ability to participate in their democracy and let their will be known at the ballot box. But taken together, these restrictions compound the likelihood that countless North Carolina voters will be deterred from voting or disenfranchised. These barriers to in-person and absentee voting, especially when imposed in the midst of the current public health crisis, will deny the franchise to eligible voters and obfuscate the will of North Carolinians, particularly those who—because of financial insecurity, medical vulnerabilities, living conditions, family care responsibilities, or lack of transportation—are unable to overcome the drastically increased costs and burdens of participating in the political process. North Carolina's failure to eliminate these barriers, or to even adopt its own State Board's recommended safeguards, violates the Free Elections Clause and obstructs the will of North Carolinians.

B. Plaintiffs will suffer irreparable injury absent an injunction.

The challenged provisions inflict irreparable harm on Plaintiffs' fundamental rights. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *Holmes*, 840 S.E.2d at 266 (citing *LWV*, 769 F.3d at 247). Irreparable harm is not limited to injury "beyond the possibility of repair or possible compensation in damages"; it also includes injury "to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949).

Here, "[t]he injury to these voters is real and completely irreparable if nothing is done to enjoin [the] law." *Holmes*, 840 S.E.2d at 266 (quoting *LWV*, 769 F.3d at 247) (alteration in

original); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (If "constitutional rights are threatened or impaired, irreparable injury is presumed."), *stay denied* 568 U.S. 970 (2012); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) ("irreparable injury is presumed when a restriction on the fundamental right to vote is at issue") (citations omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (explaining that the loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury"). Once the election comes and goes, "there can be no do-over and no redress." *Holmes*, 840 S.E.2d at 266 (quoting *LWV*, 769 F.3d at 247). Unless enjoined, the challenged absentee ballot and early voting restrictions will act individually and in concert to make voting in North Carolina, at best, unduly burdensome, and, at worst, entirely impossible for countless eligible voters during this pandemic.

Indeed, here, there is no need to guess what might happen absent an injunction. The irreparable harm that would befall North Carolinians has already been inflicted on voters across the country, including in Wisconsin, Ohio, Georgia, and even in North Carolina's 12th Congressional District. Thus, issuing an injunction "'is necessary for the protection of [Plaintiffs'] rights during the course of litigation.'" *Triangle Leasing*, 327 N.C. at 227, 393 S.E.2d at 856 (quoting *Ridge Cmty. Invs., Inc.*, 293 N.C. at 701). Without an injunction, based on the State's own projections, millions of voters are likely to be burdened, and tens of thousands are likely to be completely disenfranchised by the challenged provisions.

C. The balance of equities weighs in favor of issuing an injunction.

The balance of the equities weighs heavily in favor of an injunction because "the public interest . . . favors permitting as many qualified voters to vote as possible." *Holmes*, 840 S.E.2d at 266 (citation omitted); *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("There is a strong public interest in allowing every registered voter to vote

freely."). Enjoining the challenged provisions would reduce the burdens on voters, prevent arbitrary disenfranchisement, and protect voters' health. This would ensure North Carolinians experience a "fair and honest election[ ] [which] are to prevail in this state." *Common Cause*, 2019 WL 4569584 at *128 (quoting *McDonald v. Morrow*, 119 N.C. 666, 26 S.E. 132, 134 (1896)).

On the other hand, enjoining the challenged provisions will cause no or minimal disruption for the State or local election officials. Enjoinment of the Receipt Deadline would impose no burden at all on the State. The canvass would remain on November 12, 2020, as currently scheduled. And county boards will have no trouble counting ballots during the period leading up to the canvass. Indeed, they are already required to accept and count ballots from military and overseas absentee voters that arrive by the last day before the canvass,[26] and they are processing provisional and absentee ballot cures during that time. *See* Scott Aff. ¶ 6. As such, county officials confirm that they would have no issue with counting ordinary absentee ballots through the day before the canvass. *Id.* And while lifting the Postage Requirement will inevitably involve some additional cost, the State has already appropriated funds—largely federal CARES Act grants—toward postage costs for mailing out absentee ballots, HB 1169, § 11.1.(d); it can certainly do so for returning them, as well. Further, Plaintiffs' request to eliminate state-imposed restrictions on the early voting period imposes no burden on the State, which would be entirely unaffected by this change. Providing additional flexibility would impose no administrative burden on any local election official because it remains in his or her sole discretion to choose to do what is best for his or her county. In fact, the State's own new mandates for minimum early voting requirements are far more burdensome on election authorities than Plaintiffs' requested relief.

[26] *Military and Overseas Voting*, N.C. State Bd. of Elections, https://www.ncsbe.gov/voting/vote-mail/military-and-overseas-voting.

Indeed, much of Plaintiffs' requested relief actually *lessens* elections administration burdens on the State and other election officials. For example, eliminating the Witness Requirement places no burden on the State and relieves county election officials of the procedural step of reviewing every absentee ballot for compliance with a requirement that they do not in fact use for any verification purpose. *See* Scott Aff. ¶ 10. Likewise, enjoining the Application Assistance Ban lessens the demand on county boards to assemble MATs at a time when voters need more help than ever, yet fewer individuals are willing to risk COVID-19 infection to serve on MATs. *See id*. ¶ 11. And lifting the Ballot Delivery Ban does not impose any burden on the State or elections officials and fills a need the State cannot. *See id*. ¶ 5. Thus, the requested injunction will, in fact, provide relief to county boards and ease the burdens of election administration as absentee voting increases at unprecedented rates amid a global pandemic.

Moreover, the State itself has a constitutional interest in, and an obligation to ensure, its citizens can vote and that its elections are free and fair, and an injunction will help guarantee these rights by simplifying the voting process and ensuring eligible North Carolinians can cast ballots that will be counted. The State Board recognized exactly this when it asked that its requested changes—including eliminating the Witness Requirement, pre-paying postage, and offering more flexibility in setting early voting times—"be made permanent" "in order to ensure continuity and avoid voter confusion." State Bd. Mar. 26, 2020 Letter at 2.

With the election fast approaching, this Court should act now to protect Plaintiffs' and all North Carolinians' fundamental rights. For some of Plaintiffs' requested relief, like lifting the Receipt Deadline, the proximity of the election is immaterial. And for all of the challenged provisions, there is still plenty of time to act. In advance of the June 23 primary, the State finalized several election changes, including reduction of the Witness Requirement from two to one

witnesses, on June 12, only 11 days before Election Day.[27] Even now, within the last few weeks, the State Board has continued to issue new guidance, abandoning long-standing signature matching procedures and establishing new requirements for notifying voters of ballot deficiencies just weeks before absentee ballots are sent to voters. *See* Numbered Memo 2020-19.

The balance of equities thus clearly favors Plaintiffs. They will suffer substantial irreparable harm if disenfranchised by the challenged provisions, and the public has a strong interest in ensuring eligible voters can cast their ballots. On the flip side, the State will suffer no harm if the challenged provisions are enjoined; in fact, lifting these restrictions would likely make it easier for the State to administer an unprecedented election amid a global pandemic.

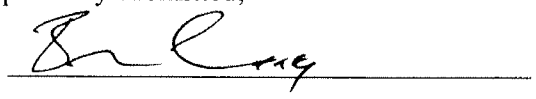
V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for preliminary injunction.

[27] *See* Press Release, *supra* note 1.

Dated: September 4, 2020

Respectfully submitted,

By: 

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This the 4th day of September, 2020.

Narendra K. Ghosh

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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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]

[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;

[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]

[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
tsteed@ncdoj.gov

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

By: _____
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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

Numbered Memo 2020-22

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Return Deadline for Mailed Civilian Absentee Ballots in 2020

DATE: September 22, 2020

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

Extension of Deadline

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

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

Postmark Requirement

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

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

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

EXHIBIT B

Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

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

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

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

1. No Signature Verification

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

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

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

2. Types of Deficiencies

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

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

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

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

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

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

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

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

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

The following deficiencies cannot be cured by certification:

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

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

2.3. Deficiencies that require board action

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

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

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

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

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

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

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

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

3.2. Receipt of a Cure Certification

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

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

3.3 County Board Review of a Cure Certification

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

4. Late Absentee Ballots

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

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

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

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)**

EXHIBIT C

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

[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.

STATE OF NORTH CAROLINA COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

DOCKET 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, 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.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

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I. INTRODUCTION

With the November 3 election only weeks away, the country is in the throes of an unprecedented public health crisis with no end in sight. The Consent Judgment represents a fair and reasonable compromise between the North Carolina officials who have the responsibility for administering elections and the Plaintiffs (collectively, the "Consent Parties"), which will help to ensure that North Carolina's election officials, who are faced with immense and unprecedented challenges as they prepare to administer—indeed, are *already* administering—the first presidential election this country has held in the middle of a pandemic, are able to do so in a manner that will provide all eligible voters with the opportunity to safely cast a ballot and have it counted, with no threat to election integrity. The alternative is continued protracted, costly litigation that threatens both widespread disenfranchisement of lawful North Carolina voters and unnecessary risks to public health. North Carolina has now reported nearly 210,000 confirmed cases of the virus and over 3,500 deaths, and is averaging 1,284 new cases per day.

As a result of the ever-increasing, widespread community spread of the virus, unprecedented numbers of North Carolinians are expected to cast their ballots by mail this election. As of yesterday, 1,116,696 of the state's voters had already requested their absentee ballots, with 27 days remaining for voters to make that request.[1] The Consent Judgment—and the Numbered Memos attached thereto—represents a fairly negotiated and reasonable compromise to ensure that these and all North Carolina voters are not broadly threatened with disenfranchisement or the risk of needlessly exposing themselves to a dangerous virus, in order to cast and have their ballot counted in this unprecedented election. Even before the pandemic, North Carolina's requirement that a mailed absentee ballot must be postmarked by Election Day and received no later than three

[1] *See* N.C. State Bd. of Elections, https://www.ncsbe.gov/ (last visited Sept. 30, 2020).

days after Election Day to be counted, N.C.G.S. § 163-231(b)(2) (the "Receipt Deadline"), disenfranchised thousands of lawful voters. In the pandemic, ballots are taking longer to get to voters, and longer to be returned to election officials, in most cases due to no fault of the voters themselves. The Consent Judgment modestly extends this Deadline to allow for the counting of ballots postmarked by Election Day, if otherwise eligible, and received up until November 12, 2020, ensuring that the Deadline does not disenfranchise lawful, eligible voters, whose ballots are late arriving because of delays either from election officials in sending them out, or the U.S. Postal Service ("USPS") in delivering them. The Consent Judgment also implements a procedure to cure certain deficiencies on absentee ballot envelopes, including missing voter, witness, or assistant signatures and addresses—all problems that plagued the primary and resulted in larger numbers of lawful ballots (disproportionately from young and Black voters) being rejected. Finally, the Consent Judgment 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 without having to wait in line with voters waiting to register and cast their ballots. In exchange for the agreements memorialized in the Consent Judgment, Plaintiffs have agreed to withdraw their motion for a preliminary injunction and dismiss all of their claims with prejudice.

In other words, the Consent Judgment would resolve Plaintiffs' lawsuit *in full* despite the fact that it would provide relief for only a portion of Plaintiffs' claims. It reflects sound public health judgment while giving election officials the tools they need to ensure that North Carolinians can exercise their constitutional right to vote notwithstanding the onset of a once-in-a-century pandemic. The Consent Parties therefore request that the Court enter this limited, fair, and

reasonable settlement agreement, and ensure that voters have safe, reliable, and reasonably accessible means of participating in the November election.[2]

II. FACTUAL BACKGROUND

The pandemic has wreaked havoc throughout the country, causing significant casualties and unforeseen disruptions to many aspects of day-to-day life. Known domestic infections have surpassed 6.8 million with more than 200,000 fatalities.[3] As of this filing, North Carolina has almost 210,00 confirmed cases and over 3,500 reported deaths from the virus, with cases continuing to rapidly increase.[4] There is no end in sight. The Director of the Centers for Disease Control and Prevention ("CDC") warned that the country should brace for "the worst fall from a public health perspective, we've ever had."[5]

[2] Plaintiffs request that the Court rule expeditiously. This past weekend, both Legislative Defendants and the Republican Committees filed federal lawsuits in an effort to end run the Consent Parties' agreement and this Court's authority to review and enter that agreement, as well as over this entire dispute. By filing those actions, Legislative Defendants and the Republican Committees ask federal courts to improperly sit in review of this proceeding, before it has even concluded. Not only are those lawsuits procedurally (and legally) improper, Legislative Defendants' and the Republican Committees' requested relief would deny Plaintiffs rights guaranteed under the North Carolina Constitution, including the ability to exercise the franchise safely and reliably in the midst of the coronavirus pandemic. Legislative Defendants and the Republican Committees' attempt to preemptively undermine this Court's judgment poses a clear and direct threat to Plaintiffs' rights and legal interests and represents a blatant disregard for this Court's authority to decide matters of state law properly before this Court. These tactics also make clear both sets of parties' intent to delay resolution of this case.

[3] *COVID-19 Data Tracker*, CDC (Sept. 24, 2020), https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#cases_casesinlast7days.

[4] *See* https://www.nytimes.com/interactive/2020/us/north-carolina-coronavirus-cases.html (last visited Sept. 30, 2020); *COVID-19 Cases*, N.C. Department of Health and Human Services (Sept. 30, 2020), https://covid19.ncdhhs.gov/dashboard/cases.

[5] *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-incontext/video/robert-redfield.

As a result, North Carolina is currently under a state of emergency and a "Safer at Home" Order issued by the Governor as a result of the pandemic. *See* Exec. Order No. 141, Safer at Home Order, Pls.' Mot. Prelim Injunc., Ex. 3; Exec. Order No. 155, Ex. 4 (extending Order). The Order, which was extended last month, "very strongly encourage[s] . . . people 65 years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes."[6] Exec. Order No. 141, § 2 (emphasis in original). It also urges all North Carolinians to practice social distancing, wear cloth masks when leaving the home and "in all public settings," carry hand sanitizer, and wash hands frequently. *Id*. Though the Order permits the reopening of certain businesses, it also sets strict limitations for occupancy and social distancing. *See* Exec. Order No. 147 § 2, Ex. 5; Exec. Order No. 155 (extending the Order). "Mass gatherings" of more than ten people indoors and 25 people outdoors are prohibited with limited exceptions, including for receiving governmental services. Exec. Order No. 141, § 7. Members of state government agencies are required to wear masks. *See* Exec. Order No. 147 § 2.

Beyond posing a direct threat to individual and public health, the pandemic has upended elections. Earlier this year, the State Board sent letters to Governor Cooper, House Speaker Tim Moore, Senate President Pro Tempore Phil Berger, and several legislative committees, explaining the challenges of conducting an election during the pandemic. State Bd. Mar. 26, 2020 Letter, Ex. 18; State Board Apr. 22, 2020 Letter, Ex. 19. The State Board warned that to protect the franchise, various changes to North Carolina's voting laws and practices were urgently needed, including (1) altering early voting sites and hours requirements to allow counties to better accommodate in-person voters during the pandemic; (2) relaxing or eliminating the Witness Requirement and

[6] Unless otherwise noted, all numbered Exhibits cited herein refer to exhibits to Plaintiffs' memorandum of law in support of their motion for preliminary injunction, filed Sept. 4, 2020.

restrictions on third-party assistance of voters in care facilities; (3) establishing a fund to pay for absentee ballot postage; (4) creating an online option for requesting absentee ballots, and allowing them to be submitted by fax and email; and (5) enabling county boards of elections to assist voters by prefilling their information on absentee ballot request forms. State Bd. Mar. 26, 2020 Letter.

Though the General Assembly adopted *some* of the actions requested by the Board, it fell far short of taking the necessary steps to protect the right to vote. Through recent emergency legislation, the General Assembly, for example, reduced the Witness Requirement from two to one witness. HB 1169, § 1.(a). But this makes little difference for the 1.1 million North Carolinians who live alone and will still need to look outside their homes or invite outsiders in to complete the requirement.[7] Governor Cooper put it best: "[m]aking sure elections are safe and secure is more important than ever during this pandemic," and "[t]his legislation makes some [ ] positive changes, but much more work is needed to ensure everyone's right to vote is protected."[8]

On top of the ongoing pandemic, mail delays threaten to disenfranchise voters. The State itself acknowledged this when it joined six other states in filing a lawsuit against USPS last month.[9] The General Counsel of USPS also sent a letter to North Carolina's Secretary of State on July 30, 2020, 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

[7] Table DP02, 2014-2018 American Community Survey, https://data.census.gov/cedsci/table?g=0400000US37&y=2018&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2018.DP02&hidePreview=true.

[8] Press Release, *Governor Cooper Signs Five Bills into Law*, (June 12, 2020), https://governor.nc.gov/news/governor-cooper-signs-five-bills-law.

[9] Compl., ECF No. 1, *Commonwealth of Pa. v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

election rules and returned promptly, and yet not be returned in time to be counted."[10] In particular, USPS 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."[11]

In recognition of the unprecedented challenges facing North Carolina voters under these circumstances, Plaintiffs' suit challenges various North Carolina laws that impose significant burdens on the right to vote in the November election which will be conducted during the COVID-19 pandemic: (1) the requirement that an absentee ballot must be postmarked by Election Day and received no later than three days after Election Day to be counted, as applied to voters who submit their ballots through USPS, N.C.G.S. § 163-231(b)(2) (the "Receipt Deadline"); (2) the requirement that voters who live alone or in single-adult households must find a qualified adult witness from outside their home and complete and sign their absentee ballots in the physical presence of that individual, N.C.G.S. § 163-231(a) (the "Witness Requirement"); (3) the requirements that absentee ballots be returned only by the voter or the voter's near relative or verifiable legal guardian, N.C.G.S. § 163-231(b); HB 1169 § 1.(a) (the "Ballot Delivery Ban"); (4) the requirement that voters provide their own postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (5) prohibitions against voters receiving assistance from the vast majority of individuals and organizations in completing

[10] Letter from USPS General Counsel to N.C. Sec'y of State, App'x to Compl., ECF No. 1-1 at 53-55, *DeJoy*, No. 2:20-cv-04096-GAM.
[11] *Id.*

or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683") (the "Application Assistance Ban"); and (6) 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) (collectively, the "Challenged Provisions").

While North Carolinians have historically relied on in-person voting as their primary means of exercising the franchise, the pandemic has ushered an unprecedented transition to absentee-by-mail voting. For many, casting a ballot by mail is not merely a choice, but a necessity without which they would not be able to participate in the electoral process without risking their health. But as these voters—many of whom will cast a ballot by mail for the first time in November—attempt to acquaint themselves with a new method of voting, the Challenged Laws, when combined with the disrupting effects of the COVID-19 pandemic, impose significant burdens on the voting process, the successful navigation of which can be the difference between casting an effective ballot and outright disenfranchisement.

III. PROCEDURAL HISTORY

On August 10, 2020, Plaintiffs filed a complaint, which they amended on August 18, against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections of several North Carolina election laws.

Also on August 18, Plaintiffs filed a motion for preliminary injunction, and, on September 4, submitted a memorandum with supporting evidence in the form of expert reports, voter and other witness affidavits, and official documents.

Among Plaintiffs' affiants include:

- Dr. Catherine Troisi, an infectious disease epidemiologist, public health expert, and Associate Professor in multiple departments at the University of Texas Health Science Center at Houston School of Public Health (UTSPH) and an Adjunct Associate Professor at Baylor College of Medicine, who concluded, based on her 40 years of experience in

epidemiology specializing in viruses, that voting in person, or in the presence of a witness particularly from outside the home, increases the risk of viral spread and an individual's chance of contracting COVID-19. *See* Troisi Aff., Ex. 2.

- Dr. Kenneth R. Mayer, a Professor of Political Science at the University of Madison-Wisconsin, who concluded that the Challenged Provisions imposes both direct and indirect costs on voters which are significantly exacerbated during the pandemic, resulting in an increase in the absentee ballot rejection rate from prior elections and tens of thousands more potentially disenfranchised voters. *See* Mayer Aff., Ex. 17.

- Ronald Stroman, who served for nine years as Deputy Postmaster General—the second highest-ranking official in USPS—from 2011 until June 1, 2020, and explained that the challenges USPS is currently facing as a result of COVID-19 and recent policy changes will place voters at significant risk of disenfranchisement under the current service standards and the likely delays in mail service which affect the delivery absentee ballots. *See* Stroman Aff., Ex. 25.

- Dr. Michael Herron, a Professor of Government at Dartmouth College, who concluded that, based on a literature review and thorough analysis of election irregularity reports in North Carolina and other states, (1) voter fraud in the United States and in North Carolina is exceedingly rare, including in absentee voting, and (2) there is no relationship between a state's allowance or denial of third party absentee ballot delivery assistance and the prevalence of absentee voting fraud. He further concludes that the coordinated election fraud conspiracy perpetrated in NC-9 in 2018 does not reveal anything about the prevalence of absentee voter fraud, or its relationship to ballot delivery assistance. Notably, the North Carolina State Board of Elections considered and found credible Dr. Herron's research on absentee ballot abnormalities in North Carolina's 9th Congressional District during its investigation. *See* Herron Aff., Ex. 34.

In addition, Plaintiffs submitted over a dozen affidavits of voters detailing the ways in which the Challenged Provisions have burdened their right to vote, and will continue to burden them when they attempt to vote in the November election—and in many cases, cause outright disenfranchisement. *See* Johnson Aff., Ex. 6; Rabinowitz Aff., Ex. 7; R. Kociemba Aff., Ex. 8; T. Kociemba Aff., Ex. 9; Newsome Aff., Ex. 10; Coggins Aff., Ex. 11; Clark Aff., Ex. 12; Curtis Aff., Ex. 13; Matos Aff., Ex. 14; Malone Aff., Ex. 21; Jurek Aff., Ex. 22; Gardner Aff., Ex. 23; Fowler Aff., Ex. 27; Fellman Aff., Ex. 32; *see also* Dworkin Aff., Ex. 29 (explaining the burdens the Challenged Restrictions place on many of the North Carolina Alliance for Retired Americans'

more than 50,000 members); Clarke Aff., Ex. 35 (detailing experience of a voter whose absentee ballot application was denied).

Plaintiffs also offered the affidavit of Kristin Scott, who has served as a county elections director for 11 years. *See* Scott Aff., Ex. 16. Ms. Scott explains the administrative burdens that the increase in requests for absentee ballots has placed on local election officials. *Id.* ¶ 3. Based on her knowledge of election administration and the disenfranchisement caused by the Receipt Deadline in past elections, Ms. Scott also explains that significantly more ballots than usual will likely arrive after the deadline this year. *Id.* ¶ 7. She recommends an extension of the Receipt Deadline for ballots postmarked by Election Day and confirms that her county board would have no issue counting ballots that arrive after the Receipt Deadline up until November 12, 2020, just before the canvass. *Id.* ¶ 6-7. She also explains that the Witness Requirement plays no role in the county board's ballot verification process and, in fact, officials have no way to confirm whether the witness information and signature provided is genuine. *Id.* ¶ 10.

Finally, Plaintiffs introduced extensive documentary evidence from state and federal government officials, which demonstrate the pandemic's ongoing disruption to day-to-day life in North Carolina (Exec. Order No. 141, Ex. 3; Exec. Order No. 155, Ex. 4; Exec. Order No. 147, Ex. 5; Order of the Chief Justice of the Supreme Court, Ex. 15); the ways in which the pandemic disrupts North Carolina's election administration and voting processes (State Board March 26, 2020 Letter, Ex. 18; State Board April 22, 2020 Letter, Ex. 19; April 7, 2020, Recommendations to Address Election-Related Effects of COVID-19, Ex. 20; Numbered Memo 2020-14, Ex. 24 Number Memo 2020-19, Ex. 30), and the impact of mail service timelines and delivery delays on this year's elections, July 30, 2020 USPS Letter, Ex. 1; August 12, 2020, USPS PMG Briefing,

Ex. 28; USPS Millennials and the Mail Report, Ex. 31; North Carolina Complaint against USPS, Ex. 26.

IV. PROPOSED CONSENT JUDGMENT

Plaintiffs and Executive Defendants reached a settlement to fully resolve Plaintiffs' claims and filed a Joint Motion for Entry of a Consent Judgment, along with the proposed Consent Judgment and three exhibits thereto (Numbered Memos 2020-19, 2020-22, and 2020-23). The express objective of the 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.

Consent Judgment § V. The only parties bound by the Consent Judgment are Defendants Damon Circosta and the North Carolina State Board of Elections, and all Plaintiffs. *See id.* § III. As such, the Consent Judgment is a "settlement and resolution of Plaintiffs' claims against Executive Defendants . . . ." *Id.* § IV.A.

Under the terms of the proposed Consent Judgment, the Executive Defendants agreed to implement a number of election administration procedures for the upcoming elections. First, Executive Defendants agreed to count ballots postmarked by Election Day if they are otherwise eligible and received up to nine days after Election Day. *See id.* § VI.A-B; Numbered Memo 2020-22. Second, Executive Defendants defined the parameters of and will implement and maintain a cure process for certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses. *See* Consent Judgment § VI.C; Numbered Memo 2020-19 (as

revised Sept. 22, 2020).[12] Third, Executive Defendants agreed to instruct 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. *See* Consent Judgment § VI.D; Numbered Memo 2020-23. Finally, Executive Defendants agreed to take reasonable steps to inform the public of these procedures. *See* Consent Judgment § VI.E.

In exchange for these changes, Plaintiffs agreed to withdraw their motion for Preliminary Injunction, not file any further motions for relief for the 2020 elections based the claims raised in their Amended Complaint, and dismiss all remaining claims related to the 2020 elections with prejudice. *See* Consent Judgment § VI.F, H. All Consent Parties further agreed to bear their own fees, expenses, and costs. *See id.* § VI.G.

V. LEGAL STANDARD

"A consent judgment is the contract of the parties entered upon the record with the sanction of the court. Thus, it is both an order of the court and a contract between the parties." *Potter v. Hileman Labs., Inc*., 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (2002) (citing *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994)). Courts examine their terms to determine whether such agreements are "fair, adequate, and reasonable" and also to confirm that the agreement 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); *see In re Estate of Militana*, 211 N.C. App. 197, 711 S.E.2d 875 (2011) (approving consent judgment that court found to be a "fair, adequate

[12] A federal court previously ordered the Executive Defendants to provide North Carolinians with a process to remedy mistakes made on ballots. *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-457, -- F. Supp. 3d --, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020). Here, the Consent Parties have agreed to the contours of this process and State Executive Defendants have agreed to implement and maintain the specific process outlined in revised Numbered Memo 2020-19.

and reasonable compromise"); *see also Stovall v. City of Cocoa*, 117 F.3d 1238, 1240 (11th Cir. 1997) ("courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy"). "In other words, a court entering a consent decree must examine its terms to ensure they are fair and not unlawful." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). A court's decision to enter a consent judgment will be reversed only "upon a clear showing that the district court abused its discretion in approving the settlement." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975) (citations omitted).

In conducting this evaluation, courts should "be guided by the general principle that settlements are encouraged." *North Carolina*, 180 F.3d at 581. The policy "to encourage settlements 'has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.'" *United States v. E.I. du Pont de Nemours & Co.*, No. 5:16-CV-00082, 2017 WL 3220449, at *11 (W.D. Va. July 28, 2017) (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)); *see Md. Dep't of the Env't v. GenOn Ash Mgmt., LLC*, Nos. 10-0826, 11-cv-1209, 12-cv-3755, 2013 WL 2637475, at *1 (D. Md. June 11, 2013) (citing *United States v. City of Welch*, No. 1:11-00647, 2012 WL 385489, at *2 (S.D. W. Va. Feb. 6, 2012)) ("[W]hen a settlement has been negotiated by a specially equipped agency, the presumption in favor of settlement is particularly strong.").

VI. ARGUMENT

To approve a consent judgment, "the Court need not decide whether Plaintiffs had established their claim 'to a legal certainty,' nor need it reach 'any dispositive conclusions on . . . unsettled legal issues in the case[.]'" *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *6 (W.D. Va. May 5, 2020) ("*Virginia LWV I*")

(quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975)). Instead, the Court need only "examine the merits of Plaintiffs' settled claims in order to determine whether success was at least probable." *Id.* "So long as the record before it is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Id.* This review "does not require the court to conduct a trial or a rehearsal of the trial," but rather "ensure that it is able to reach an informed, just and reasoned decision." *North Carolina*, 180 F.3d at 581 (citations omitted). Overall, courts should judge the fairness of the compromise "by weighing the plaintiff[s'] likelihood of success on the merits against the amount and form of the relief offered in the settlement" but, critically, they "do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (citation omitted); *Bragg v. Robertson*, 83 F. Supp. 2d 713, 718 (S.D. W. Va. 2000) ("[The court] need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy. In fact, it is precisely the desire to avoid a protracted examination of the parties' legal rights that underlies entry of consent decrees.") (citations omitted), *aff'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

A. The proposed Consent Judgment is "fair, adequate, and reasonable."

As part of its determination as to whether the proposed Consent Judgment is fair, adequate, and reasonable, the court may assess the strength of Plaintiffs' case, taking into account "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement." *North Carolina*, 180 F.3d at 581 (citations omitted). But, to be clear, "[the court] need not . . . inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy." *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W. Va. 2000).

1. Stage of the proceedings

This case was filed in early August. Because it seeks relief for the November 2020 election, it requires swift resolution. *See Virginia LWI*, 2020 WL 2158249, at *5 (approving consent judgment agreed to just two weeks after case was filed, in part because case challenged restrictions on election taking place seven weeks later). Discovery in this case was limited to several depositions conducted by the Legislative Intervenors to facilitate their response to Plaintiffs' motion for preliminary injunction, but, as acknowledged by the court in *Virginia LWV I*—a case challenging a similar witness requirement in Virginia—"there is little indication [that] . . . the length or amount of discovery . . . will be particularly relevant to the strength of Plaintiffs' case." *Id.* Instead, there, like here, much of the documents and evidence necessary to prove Plaintiffs' case were in the public record or offered by experts. *Id.* This includes government reports, state and federal public health policies and orders, as well as the declarations of experts demonstrating that the Receipt Deadline and the Witness Requirement will burden and disenfranchise North Carolina voters. *Id*. ("Plaintiffs would presumably rely, as they have thus far in this action, on government reports, state and federal public health policies and orders, as well as the declarations of experts").

Among the extensive evidence Plaintiffs presented thus far was an expert report from Dr. Ken Mayer who examined past election data to forecast that tens of thousands of North Carolinians would be disenfranchised by the Receipt Deadline and the Witness Requirement in the November election. Plaintiffs also submitted published reports and communications from the USPS itself which warned that North Carolina's deadlines for requesting and submitting absentee ballots do not comport with standard USPS delivery timelines—much less the well-documented service delays that led the State of North Carolina to file a lawsuit against USPS—and would result in the

disenfranchisement of North Carolina voters; numerous documents from federal and state agencies, explaining the risks of contracting COVID-19 through interactions necessitated by the Witness Requirement and voting in-person, along with a public health expert, Dr. Troisi, whose report explained the health risks of in-person voting and of complying with the Witness Requirement. In total, Plaintiffs submitted four expert reports, 17 affidavits, and numerous publicly-available documents, in support of their motion for preliminary injunction, amounting to over 500 pages of evidence, all of which were appropriately considered by the Executive Defendants in reaching a compromise settlement and entering into a proposed consent judgment.

That the Legislative Intervenors have not completed all of the discovery they desire is no basis to withhold approval of a consent judgment, nor are Legislative Defendants entitled to *post-settlement* discovery on the merits of Plaintiffs' claims simply because they object to the Consent Judgment. Indeed, this year alone, numerous courts have approved consent judgments granting similar relief from absentee voting restrictions in the midst of the COVID-19 pandemic, without *any* discovery whatsoever. *See Virginia LWV I*, 2020 WL 2158249 (approving consent judgment, without discovery, just two weeks after plaintiffs filed their complaint, enjoining enforcement of Virginia's absentee ballot witness requirement for 2020 primary election); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 4927524 (W.D. Va. Aug. 21, 2020) ("*Virginia LWV II*") (approving consent judgment filed 10 days after motion for preliminary injunction, without discovery, enjoining enforcement of Virginia's witness requirement for 2020 general election); *Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4365608, at *1 (D.R.I. July 30, 2020) (approving consent judgment, without discovery and just six days after Plaintiffs filed their complaint, enjoining enforcement of Rhode Island's absentee ballot witness requirement for the November 2020 general

election), *stay denied sub nom.* No. 20A28, 2020 WL 4680151 (Aug. 13, 2020); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment, without discovery, enjoining Minnesota's witness requirement and ballot 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) (same for November general election).

2. Compromises reached in the proposed Consent Judgment

The fairness and reasonableness of the proposed Consent Judgment is reflected in the concessions each party made to reach an agreement that will benefit the parties and, most importantly, North Carolina voters. *See Virginia LWV I*, 2020 WL 2158249, at *5. Especially important in evaluating the fairness of the proposed Consent Judgment is the "limited nature of the settlement agreement's relief," and the fact that it grants Plaintiffs only a portion of the relief sought in the case "weighs in favor of a finding that it is 'fair, adequate, and reasonable.'" *Virginia LWV II*, 2020 WL 4927524, at *7.

Plaintiffs originally sought to enjoin several voting restrictions that were bargained away in the negotiating of the Consent Judgment, including North Carolina's refusal to pre-pay postage for absentee ballots; restrictions on third party assistance for voters in requesting and submitting absentee ballots; limitations on the number of early voting days and hours that counties may offer; and, the Witness Requirement. Notably, other courts have granted such relief (or, in the case of the postage requirement, other states have voluntarily agreed to pre-pay postage after a lawsuit was filed) in light of the COVID-19 pandemic.[13] *See, e.g., Harding v. Edwards*, No. CV 20-495-

[13] Legislative Defendants and the Republican Committees may argue that Numbered Memo 2020-23 authorizes absentee ballot delivery by third parties, but any such claim misrepresents the

SDD-RLB, 2020 WL 5543769, at *19 (M.D. La. Sept. 16, 2020) (granting injunctive relief to increase early voting period for November election); Joint Stipulation Resolving Postage Claims, *Middleton v. Andino*, No. CV 20-1730-JMC, ECF No. 58 (D.S.C. July 8, 2020) (South Carolina will provide prepaid postage on all absentee ballot return envelopes for November 2020 election); *Driscoll v. Stapleton*, No. DA 20-0295 (Mont. Sup. Ct. Sept. 29, 2020) (permanently enjoining limits on third party ballot collection assistance); *Mich. Alliance for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (enjoining limits on third party ballot collection assistance for four days preceding Election Day).

And the agreements contained in the Consent Judgment are eminently reasonable. The modest extension of the Receipt Deadline, for instance, brings the Deadline for all North Carolinians in line with the pre-existing deadline for oversees and military voters, and also responds to warnings issued by USPS in its July 30, 2020 letter to North Carolina's Secretary of State. The absentee ballot drop-off stations set forth in Consent Judgment § VI.D; Numbered

Numbered Memo, North Carolina law, and the longstanding practices of North Carolina election officials. North Carolina law does not prohibit, and Plaintiffs did not challenge, any restriction on the counting of ballots delivered by third parties, because none exists. Rather, Plaintiffs challenge the prohibition against absentee ballot delivery by most third parties. *See* Am. Compl., Prayer for Relief. The Memo's instruction to count ballots delivered by third parties merely reiterates longstanding policy in North Carolina and does not alter any North Carolina law. As the State Board's General Counsel explained, there is no prohibition in North Carolina law against counting absentee ballots delivered by a third party. *See* State Board of Elections, Sept. 15, 2020, Meeting Minutes at 7-8 ("An absentee ballot is not invalid if delivered by someone not authorized."), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/DRAFT_SBOE%20Minutes%209.15.20%20Closed%20Session.pdf; *compare* N.C.G.S. § 163-226.3(a)(5) (it is a felony for most third parties to deliver a voter's absentee ballot) *with id.* § 163-230.2(e)(4) (a request for absentee ballots is not valid if returned by anyone other than the voter or an authorized individual). Moreover, Numbered Memo 2020-23 makes clear that "[o]nly the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot," and that "an absentee ballot may not be left in an unmanned drop box." Numbered Memo 2020-23 at 1. And the memo reiterates that "[i]t 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." *Id.* at n.1 citing G.S. § 163-223.6(a)(5).

Memo 2020-23 provide voters a safer more streamlined option to return their ballots in person, alleviating the need for those who can travel to drop off their ballots to rely on potentially delayed mail service, third parties, or to wait in long lines at early voting sites to deliver their ballots, and has the invaluable benefit of reducing adverse public health outcomes for voters and election workers. The procedures set forth in Consent Judgment § VI.C, Numbered Memo 2020-19, allow voters to cure certain errors on absentee ballot envelopes, including missing witness information, by completing an affidavit (provided directly by election officials and personally-addressed specifically to each voter). At the same time, it leaves the Witness Requirement in place.

In sum, the proposed Consent Judgment would resolve the entirety of Plaintiffs' lawsuit and provide certainty as to the procedures that will apply for absentee and in-person voting well in advance of Election Day and the early voting period—which may not have been the case had the parties engaged in protracted litigation.

3. Probability of success on the merits

Plaintiffs' lawsuit pled several likely violations of North Carolina Constitution on which Plaintiffs had a strong probability of success on the merits, providing further support for the fairness and reasonableness of the proposed Consent Judgment. As Plaintiffs argued in their Preliminary Injunction brief, the Receipt Deadline and Witness Requirement severely burden the fundamental right to vote on equal terms and burden constitutionally-protected speech and political association, thus strict scrutiny applies. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (applying strict scrutiny because "[i]t is well settled in this State that the right to vote on equal terms is a fundamental right") (citation omitted), *stay denied*, 535 U.S. 1301 (2002). To pass strict scrutiny, "the government must show a compelling interest in the regulation, and the regulation

must be narrowly tailored to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012).

But even if these challenged provisions were subject to less stringent scrutiny, even lesser burdens imposed on the right to vote, still must "be sufficiently weighty to justify the limitation imposed on the party's rights." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 48, 707 S.E.2d 199, 205-06 (2011) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). This framework is analogous to the one federal courts apply, developed in the U.S. Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under this framework, courts "weigh 'the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Thus, state regulations that do not necessarily impose "severe" burdens on the fundamental right to vote are nonetheless subject to exacting forms of scrutiny, requiring the state to "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545-46 (6th Cir.), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio State Conf. of N.A.A.C.P.*, 768 F.3d at 538 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.)). As applied to the upcoming November Election, neither the Receipt Deadline nor the Witness Requirement passes constitutional muster under strict scrutiny or the *Anderson-Burdick* test.

a. Receipt Deadline

To ensure that voters who timely cast a valid absentee ballot are not disenfranchised, the proposed Consent Judgment extends the absentee ballot Receipt Deadline from three days to nine days after Election Day and provides alternative, streamlined procedures for in-person absentee ballot drop-off stations at all one-stop early voting locations and county board offices. Consent Judgment §§ VI.B, VI.D. This relief follows warnings from USPS indicating that the deadlines for requesting and submitting absentee ballots under North Carolina law are incompatible with USPS's service standards and poses a substantial risk of disenfranchising countless voters who request their ballots within the time permitted under North Carolina law and "promptly" return them. July 30, 2020, USPS Letter, *see* Stroman Aff. ¶¶ 14-17. Further exacerbating the risk of disenfranchisement are the well-documented mail delivery delays, which result in voters' ballots being rejected for reasons entirely outside of their control. *See id.* ¶¶ 11, 13, 17; Compl., ECF No. 1, *Commonwealth of Pa. v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020). Even before the onset of the pandemic, when very few North Carolinians voted by mail, thousands of otherwise eligible absentee ballots were rejected for late arrival. Mayer Aff. at 15-16 (Table 2). Based on the projections of state officials, the number of mail absentee ballots cast this November will be in the range of 1.8 million to 2.3 million (if not more); if past trends hold, that means *at least* tens of thousands of timely-submitted ballots will be rejected simply because they were delivered late. *Id.* at 29.

As more voters turn to absentee voting and mail delays grow, courts across the country have recognized that receipt deadlines must be altered to match reality, and states are being ordered to accept—and count—otherwise valid ballots mailed by Election Day to prevent widespread disenfranchisement. *See* Stroman Aff. ¶¶ 13-14. For example, in April, the U.S. Supreme Court affirmed a federal district court decision that extended Wisconsin's receipt deadline by six days,

saving the votes of nearly 80,000 citizens who cast valid ballots that were postmarked on or before Election Day but arrived in the days following due to delayed mail service and complications caused by COVID-19. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). The Supreme Court expressed no concerns about "afford[ing] Wisconsin voters several extra days in which to mail their absentee ballots," so long as those ballots were "postmarked by election day." 140 S. Ct. at 1206. Due to the pandemic, unprecedented levels of expected absentee voting, USPS delays, and well-founded concerns that voters who cast otherwise valid absentee ballots on or before Election Day will be disenfranchised through no fault of their own, numerous other courts have granted similar receipt deadline extensions. *Democratic Nat'l Committee v. Bostelmann*, Nos. 20-cv-249-wmc, 20-cv-278-wmc, 20-cv-340-wmc & 20-cv-459-wmc (W.D. Wis. Sept. 21, 2020), Ex. A, attached hereto, *stay denied*, Nos. 20-2835 & 20-2844 (7th Cir. Sept. 29, 2020), Ex. B, attached hereto (extending Wisconsin's ballot receipt deadline for November 2020 election); *Common Cause Ind. v. Lawson*, No. 1:20-cv-02007-SEB-TAB (S.D. Ind. Sept. 29, 2020), Ex. C, attached hereto (same for Indiana); *Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (same for Michigan); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (same for Pennsylvania); *New Ga. Project v. Raffensperger*, No. 1:20-cv- 01986-ELR (N.D. Ga, Aug. 31, 2020) (same for Georgia); *LaRose v. Simon*, No. 62-CV-20-3149, at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's ballot receipt deadline).

No state interest is sufficiently weighty to justify the burdens imposed by the Receipt Deadline. Receiving ballots until November 12 will not interfere with the State's ability to count votes and certify elections. In fact, election officials are already required and frequently called upon to count ballots submitted or finalized well after Election Day: North Carolina voters who

submit provisional ballots may provide supporting documentation up until close of business on the day before the county canvass, which cannot occur before 11:00 a.m. on the tenth day after an election to have their ballots counted, *see* N.C.G.S. § 163-82.4(f), and military and overseas voters' absentee ballots are considered timely if they are transmitted by Election Day and received before close of business on the day before the county canvass, *see* N.C.G.S. § 163-258.12(b). The election officials who would count these ballots *confirm* that doing so prior to the canvass would impose no burden on their operations. *See* Scott Aff. ¶ 6 (explaining county board would have no issue counting a ballot that arrives any time before the canvass on November 12). In any event, the prospect of counting more ballots cannot justify the arbitrary disenfranchisement caused by the Receipt Deadline. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (holding "administrative convenience" cannot justify the deprivation of a constitutional right); *see also Democratic Nat'l Comm. v. Bostelmann*, 415 F. Supp. 3d 952, 971 n.14 (W.D. Wis.), *stayed in part*, Nos. 20-1538, 20-1546, 20-1539, 20-1545, 2020 WL 3619499 (7th Cir. Apr. 3), *stayed in part sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).[14]

b. Witness Requirement

The Consent Judgment does not eliminate the Witness Requirement; Plaintiffs and the State Board instead compromised on a procedure to cure certain deficiencies on absentee ballots, including missing voter, witness, or assistant signatures and addresses. Consent Judgment § VI.C. Nevertheless, the likelihood of success on Plaintiffs' challenge to the Witness Requirement was at

[14] According to the State Board, the Election Day postmark deadline "is in place to prohibit a voter from learning the outcome of an election and then casting their ballot." Numbered Memo 2020-22 at 1. Since the date by which a voter must send their ballot remains unchanged and on or before Election Day, the Receipt Deadline extension does not infringe upon the State's interests served by this law. Indeed, the Numbered Memo makes clear that only ballots that can be verified as having been in the position of a USPS or commercial carrier by Election Day may be counted. *Id.* at 2.

least probable, thus the compromise reached by the Consent Parties, which leaves the Witness Requirement in place, further demonstrates the reasonableness of the proposed Consent Judgment.

The Witness Requirement mandates that even voters in single-adult households, like Plaintiffs Rabinowitz and Johnson and the Alliance's members, complete their absentee ballots in the physical presence of a qualified adult witness. *See* Rabinowitz Aff. ¶ 5; Johnson Aff. ¶ 5; Dworkin Aff. ¶ 8; Curtis Aff. ¶ 4; Clark Aff. ¶ 6. Earlier this year, the State Board acknowledged that the Witness Requirement "increases the risk of transmission or exposure to disease," State Bd. Apr. 22, 2020 Ltr., including through environmental surfaces like ballot envelopes, that can be contaminated with the virus, Troisi Aff. ¶¶ 11, 31. Moreover, "there is increasing evidence . . . that aerosolized droplets . . . can spread the virus" to individuals over 15 feet away, and that aerosols may play a more important role in transmission than droplets. *Id.* ¶ 11.

Since the State Board's initial warning, the rate of new COVID-19 cases in North Carolina has only increased, Troisi Aff. ¶ 10, yet the Witness Requirement forces over at least a million North Carolinians who live alone to choose between protecting their health and exercising their constitutional right to vote. Mayer Aff. at 12. Recognizing the unjustifiable burdens that witness requirements place on voters, numerous courts have modified or enjoined their enforcement for at least the duration of the pandemic—exactly the relief Plaintiffs were seeking here.[15] That Plaintiffs

[15] *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 and decree suspending "notary or two-witness requirement" for mail ballots), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (Aug. 13, 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 witnessing 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); *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" witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests

or other North Carolinians may limitedly venture out to fulfill the needs of daily life does not lessen the burden of risking one's health to vote. "Such risks may be necessary to obtain food and other necessities, but the burden one might be forced to accept to feed oneself differs in kind from the burden that the First and Fourteenth Amendments tolerate on the right to vote." *Virginia LWV II*, 2020 WL 4927524, at *9. Nor does the possibility of individual voters taking great measures to exercise their right to vote lessen the burden of the challenged restriction. As a federal court in Rhode Island explained:

> Could a determined and resourceful voter intent on voting manage to work around these impediments? Certainly. But it is also certain that the burdens are much more unusual and substantial than those that voters are generally expected to bear. Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.

Common Cause RI. v. Gorbea, No. 20-1753, 2020 WL 4579367, at *14-15 (1st Cir. Aug. 7, 2020), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (Aug. 13, 2020).

These burdens imposed by the Witness Requirement are not justified by any purported interests in fraud prevention. In *Virginia LWV I*, the Western District of Virginia considered a similar witness requirement's efficacy in preventing voter fraud in assessing whether the burdens it imposed were justified. 2020 WL 2158249 at *9. There was no evidence suggesting that allowing certain voters to opt out of the witness requirement would "increase voter fraud in any meaningful way," which was "particularly true when considering all of the other means of combatting voter fraud integrated into the absentee-voting system." *Id.*

of combating voter fraud and protecting voting integrity"); *Virginia LWV I*, 2020 WL 2158249, at *8 ("The Constitution does not permit a state to force" voters to choose "between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election.").

Similarly, in *Middleton v. Andino*, a South Carolina federal court enjoined the state's witness requirement for the November election, finding that it poses "a significant burden" on voters. 3:20-cv-01730-JMC, 2020 WL 5591590, at *30 (D.S.C. Sept. 18, 2020).[16] In doing so, the Court found that, although the state generally has an interest in investigating voter fraud, "the specific means of promoting that interest—here, the Witness Requirement—is marginal." *Id.* at *31. Defendants had introduced a declaration of a veteran investigator of the South Carolina Law Enforcement Division who alleged that the witness requirement provided a "significant" investigatory function; however, the court refused "to take the state's conclusory assertions at face value simply because one veteran law enforcement officer describes the Witness Requirement as providing a 'significant' lead in fraud investigations." *Id.* Much like in *Virginia LWV I* and *Middleton*, it is well-documented that the incidence of voter fraud, including absentee voter fraud, in American elections (including elections held in North Carolina) is extremely low. Herron Aff. ¶¶ 26-54. And the Witness Requirement did nothing to prevent Republican operatives led by Leslie McRae Dowless from forging witness signatures and impersonating voters in furtherance of their fraudulent scheme which corrupted the 2018 general election in North Carolina's Ninth Congressional District. *See* Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District, N.C. State Bd. of Elections, March 13, 2019 ("Order"), at p. 2, Ex. 33. The State Board found that Dowless engaged in a calculated effort to "submit forged absentee by mail request forms without voters' knowledge" and collect unsealed and unvoted absentee

[16] The District Court's injunction was initially stayed pending appeal by a divided panel of the Fourth Circuit. *See Middleton v. Andino*, No. 20-2022, 2020 WL 5739010, at *1 (4th Cir. Sept. 24, 2020). However, in an incredibly rare move, the Fourth Circuit *sua sponte* vacated the stay and granted rehearing en banc. *See Middleton v. Andino*, No. 20-2022, 2020 WL 5752607 (4th Cir. Sept. 25, 2020). The en banc Fourth Circuit denied the motion for stay pending appeal. *See Middleton v. Andino*, No. 20-2022 (4th Cir. Sept. 30, 2020), Ex. D, attached hereto.

ballots—actions which were already prohibited by other criminal laws. *Id.* ¶¶ 46-47, 52, 60, 62-63; *see also* Herron Aff. ¶¶ 52, 104-06, 108, *see also* 121-22, N.C.G.S. § 163-237(d) (criminalizing fraud in connection with absentee ballots). Although the Witness Requirement was in place long before Dowless perpetrated his fraudulent scheme, it clearly did not deter his criminal enterprise. County election officials have themselves confirmed that the Witness Requirement plays no role in their verification process for absentee ballots, nor does it deter or prevent potential voter fraud. *See* Scott Aff. ¶ 10, 12-14.

The State Board, moreover, has provided evidence 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."[17] Here, the cure provision necessarily addresses that risk by requiring that the individual voter be contacted by a county election official and affirm through a sworn affidavit that the ballot at issue is indeed theirs. Numbered Memo 2020-19. There can be no dispute that the cure process outlined in Numbered Memo 2002-19 "prevents" a "voter from having her ballot stolen and marked without her knowledge." *Id.* The consent judgment does *not* eliminate the Witness Requirement, but instead provides voters with an opportunity to resolve errors or other questions about their ballot that would otherwise result in their disenfranchisement. Consent Judgment § VI.C. No state interest justifies a prohibition on *curing* absentee ballots, even those

[17] North Carolina Department of Justice Memorandum to SBOE re: COVID-19-Related Litigation, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/2020.09.14%20Memo.pdf.

with missing witness information, through procedures that accomplish the same purpose (i.e. witness identification) while avoiding the disenfranchisement of countless voters.[18]

4. The Parties were adequately represented by counsel.

The parties are each ably represented by experienced counsel, which further supports the fairness and adequacy of the consent judgment. Plaintiffs' counsel from Perkins Coie LLP and Patterson Harkavy LLP have extensive public interest litigation experience, particularly in voting rights cases at all levels of North Carolina state and federal courts, and the U.S. Supreme Court. Executive Defendants also benefit from the experienced and specialized representation of the Department of Justice. *See, e.g.*, *Virginia LWV I*, 2020 WL 2158249, at *5 (finding counsel for plaintiffs and state defendants "provided fair and adequate legal counsel in representing Plaintiffs in the adoption of the partial settlement agreement"); *Carcano v. Cooper*, No. 1:16CV236, 2019 WL 3302208, at *6 (M.D.N.C. July 23, 2019) (finding "the parties have had the benefit of excellent legal counsel" including representation by "large, sophisticated law firms" and the "Defendants are well-represented by the North Carolina Department of Justice"). "[W]hen a settlement has been

[18] Indeed, many courts in the past several months have ordered election officials to give voters an opportunity to cure absentee ballots, including after Election Day. *Ariz. Democratic Party v. Hobbs*, 2020 WL 5423898 (D. Ariz. Sept. 10, 2020) (granting preliminary injunction and ordering Arizona election officials to provide voters with seven days after Election Day to cure absentee ballots with missing signatures); *League of Women Voters of New Jersey et al. v. Tahesha Way*, No. 20-cv-05990, ECF No. 34 (E.D.N.J. June 17, 2020) (granting preliminary injunction and ordering New Jersey election officials to allow voters to cure absentee ballots with missing or mismatched signatures for sixteen days after Election Day); *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 3068160 (D.N.D. June 5, 2020) (holding North Dakota's cure procedures for absentee ballots violated due process and ordering North Dakota's election officials to allow voters six days after Election Day to cure their absentee ballot); *Frederick v. Lawson*, No. 1:19-cv-0959-SEB-MJD, 2020 WL 4882696, (S.D. Ind. Aug. 20, 2020) (permanently enjoining Indiana election officials from rejecting any absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *League of Women Voters of the United States et al. v. Kosinski*, et al., No. 1:20-cv-05238, ECF No. 37 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring New York election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

negotiated by a specially equipped agency, the presumption in favor of settlement is particularly strong." *Md. Dep't of the Env't*, 2013 WL 2637475, at *1. And where the parties consist of the North Carolina State Board of Elections and its Chair—each of which has specialized experience in administering elections in North Carolina—that presumption is at its zenith.

B. All other relevant factors support entering the consent judgment.

1. The agreement is in the public interest and the agreement is not unlawful.

A consent judgment that prevents "the likely unconstitutional application of a state law . . . is neither unlawful, nor against the public interest." *Virginia LWV I*, 2020 WL 2158249, at *10. This is especially true in the context of a consent decrees applicable to an election "which [is taking] place during the worst pandemic this state, country, and planet has seen in over a century." *Id.* "The public health implications have been vast and unprecedented in the modern era, with no one left untouched by the risk of transmission." *Id.* Thus, under these circumstances, a consent judgment that removes unnecessary restrictions on voters' ability to cast their vote without risking exposure to COVID-19, and avoids a probable violation of the Constitution advances the public interest, which "favors permitting as many qualified voters to vote as possible." *Holmes v. Moore*, 840 S.E.2d 244, 266 (N.C. App. 2020). *See Virginia LWV I*, 2020 WL 2158249, at *10-11.

The extended ballot receipt deadline, cure procedure, and additional absentee ballot drop-off stations reduce burdens on voters, prevent arbitrary disenfranchisement, and protect voters' and election workers' health. This is particularly true given the warning from USPS that North Carolina's Receipt Deadline poses a substantial risk of disenfranchising countless voters who timely request and promptly return their absentee ballots. July 30, 2020, USPS Letter; *see also* Stroman Aff., ¶¶ 14-17. By ensuring that North Carolina voters are not arbitrarily disenfranchised for reasons (i.e. delayed mail delivery) outside their control, the proposed Consent Judgment ensures that North Carolina remains faithful to the long-held principle that "fair and honest

elections are to prevail in this state." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128 (N.C. Super. Ct. Sept. 3, 2019) (quoting *McDonald v. Morrow*, 119 N.C. 666, 26 S.E.2d 132, 134 (1896), *aff'd*, 955 F. 3d 246 (4th Cir. 2020)).

2. The agreement is not the product of collusion between the drafting parties.

The proposed Consent Judgment was the product of good-faith negotiations between the Consent Parties. Absent evidence to the contrary, the court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *Virginia LWV I*, 2020 WL 2158249, at *11 (citing cases); *Virginia LWV II*, 2020 WL 4927524, at *11 (citing cases). Not only is the record devoid of any evidence of collusion—which entitles the Consent Parties to a presumption of good faith—various factors present here indicate arms-length negotiations.

First, the Consent Parties reached a partial agreement only after Plaintiffs filed their preliminary injunction motion and extensive supporting evidence, including four expert reports and 17 lay witness affidavits, and after the Court set a hearing date on that motion. *See supra* at 7-10. Plaintiffs also cited countless publicly-available documents, including documents from federal and state officials relating to the COVID-19 pandemic, the difficulties of voting during the pandemic, and official USPS reports and communications demonstrating that North Carolina's election deadlines were incompatible with its delivery standards. The limited nature of the proposed Consent Judgment, which provides relief for only a portion of Plaintiffs' claims, is a significant indicator that the agreement was negotiated at arms' length, as are the compromises and concessions made by both of the Consent Parties. *See supra* at 10-11.

It is of no import that the Executive Defendants had not yet filed briefs opposing Plaintiffs' claims. The time to do so has not passed. *Virginia LWV I*, 2020 WL 2158249, at *11 (finding that though Defendant had not yet opposed plaintiffs' preliminary injunction motion, "Defendants'

litigation posture is fully consistent with an arms-length negotiation among opposing parties to seek a negotiated solution to a narrow, immediate dispute rather than collusion."). Similarly, Executive Defendants' opposition to intervention by political parties "is neither a surprise nor a hallmark of collusion." *Id.* at *11. Nor is there any concern here about "elected state officials seek[ing] to bind their successors as to a matter about which there is substantial political disagreement," *Carcano,* 2019 WL 3302208, at *6, as the agreement only pertains to the 2020 elections. Any allegations of collusion are unfounded.

To further demonstrate the fairness of the proposed Consent Judgment, Executive Defendants have taken the unusual step of publicly releasing confidential briefings and closed session minutes.[19] Members of the State Board voted to release these documents after two former board members issued unsubstantiated public statements criticizing the process that led to the proposed agreement—the authenticity of those statements was swiftly debunked.[20] The materials released by Executive Defendants conclusively demonstrate that the proposed Consent Judgment involved significant compromises for all parties, that negotiations were conducted at arm's length, that all State Board members were thoroughly briefed on the possibility of settlement, and that all

[19] *See State Board Releases Closed Session Minutes, Briefings*, N.C. State Bd. of Elections (Sept. 25, 2020), https://www.ncsbe.gov/news/press-releases/2020/09/25/state-board-releases-closed-session-minutes-briefings.

[20] *See, e.g.*, Will Doran & Danielle Battaglia, *Republican election officials resigned after call with lawyer for 'very unhappy' NCGOP*, News & Observer (Sept. 25, 2020), https://www.newsobserver.com/news/politics-government/election/article246017110.html (stating that Republican board members' resignation letters came after a call with an attorney for the North Carolina Republican Party and noting evidence the resignations were "not voluntary," but rather that board members were "told to resign").

members had ample opportunity to—and did—ask questions and provide feedback on the proposed Consent Judgment.[21]

3. The agreement does not burden any third parties' obligations, rights, or duties.

The proposed Consent Judgment implicates the rights of the Consent Parties, and requires no approval from Legislative Intervenors or the Republican Committees. *See* Consent Judgment § IV.A ("This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit."). To enter a consent judgment, North Carolina law only requires the consent "of the parties thereto." *Carden v. Owle Constr., LLC*, 218 N.C. App. 179, 184, 720 S.E.2d 825, 829 (2012); *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 492-93, 521 S.E.2d 117, 120 (1999); *Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995). Plaintiffs and Executive Defendants have consented to the Consent Judgment, and it is otherwise "fair and not unlawful," and should therefore be entered by the Court. *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002).

One party is not permitted to prevent others from entering into a consent judgment to resolve their disputes. *See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of*

[21] *See* Closed Session Board Minutes, N.C. State Bd. of Elections (Sept. 15, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/DRAFT_SBOE%20Minutes%209.15.20%20Closed%20Session.pdf. (demonstrating significant discussion of possible settlements and agreement to final terms); *Bench Memo*, N.C. State Bd. of Elections (Sept. 15, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/September%2015%202020%20Bench%20Memo_Redacted.pdf (thoroughly informing board members of the status of lawsuits and factors to consider when decided whether to settle); Memorandum, N.C. State Bd. of Elections (Sept. 14, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/2020.09.14%20Memo.pdf (providing board members with information on the status of outstanding lawsuits, outcomes of similar lawsuits in other states, and discussion of the advantages and disadvantages of possible settlement terms).

Cleveland, 478 U.S. 501, 528-29 (1986) ("It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation."). An intervenor cannot block a Consent Judgment by merely withholding consent. *Id.* at 529; *see Sierra Club v. North Dakota*, 868 F.3d 1062, 1066 (9th Cir. 2017) ("The Supreme Court adopted this approach for good reason; otherwise, one party could hold the other parties hostage in ongoing litigation, and a global settlement or judgment would be the only option.").

While "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree," that is clearly not the case here where the proposed Consent Judgment does "not impose duties or obligations on [Legislative Intervenors]." *Local No. 93*, 478 U.S. at 529. Specifically, the Consent Judgment "does not bind" Legislative Intervenors "to do or not do anything." *Local No. 93*, 478 U.S. at 537; *see also Democratic National Committee v. Bostelmann*, Nos. 20-2835 & 20-2844 (7th Cir. Sept. 29, 2020), Ex. B, attached hereto (finding state legislature had no standing to appeal order extending Receipt Deadline because the "[c]onstitutional validity of a law does not concern any legislative interest"). In fact, it does not reference the Legislative Intervenors whatsoever and "does not purport to resolve any claims" that Legislative Intervenors might have. Consent Judgment § VII; *see also Virginia LWV I*, 2020 WL 2158249, at *14 (approving consent judgment over objection of third party when judgment did not "bind" the party, "impose[d] no legal duties or obligations" on the party, and "reference" the party, or "purport to resolve" any claims the party might have). Rather, "only the parties to the decree" can be held liable "for failure to comply with its terms." *Id.*; *see* Consent Judgment § VII.

Here, Legislative Intervenors will have opportunity to object to the proposed Consent Judgment at the hearing scheduled by the Court. *Local No. 93*, 478 U.S. at 529. However, this is

"all the process that [Legislative Intervenors are] due." *Id.*; *see Virginia LWV I*, 2020 WL 2158249, at *13 ("[T]he rule [against permitting intervenors to block consent decrees] is 'especially applicable' where the intervenor . . . participates in the hearing on the proposed consent decree and briefs the proposed remedy." (quoting *Sierra Club*, 868 F.3d at 1067)); *see Virginia LWV I*, 2020 WL 2158249, at *14. Plaintiffs' claims raise serious constitutional questions that demand the type of relief offered by the proposed Consent Judgment.

4. The consent judgment's terms fall within the State Board's emergency powers.

The State Board has ample authority to enter into the agreement set forth in the proposed Consent Judgment. It has broad, general supervisory authority over elections, N.C. Gen. Stat. § 163-22(a), and is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c). Furthermore, the Executive Director of the State Board, who is appointed by and reports to the Board, N.C. Gen. Stat. § 163-27, 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. Indeed, the State Board's implementation of Numbered Memo 2020-19 was compelled by the federal court injunction entered in *Democracy North Carolina*, which remains in force. In sum, the proposed Consent Judgment not only reflects a good faith compromise necessary to resolve likely violations of the State Constitution, it is consistent with the authority granted to the State Board to conduct elections in times of emergency, under the very circumstances that gave rise to this lawsuit in the first place.

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

Dated: September 30, 2020

Respectfully submitted,

By: /s/ Uzoma N. Nkwonta

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This the 30th day of September, 2020.

/s/ Uzoma N. Nkwonta
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

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

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

[2] *Id.*

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

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

[5] *Id.*

[6] *Id.*

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

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

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

[7] *Id.*

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

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

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

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

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

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

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

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

NATURE OF THE ACTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

A. North Carolina's Absentee Ballot Integrity Statutes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CLAIMS

COUNT ONE

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

92. Plaintiffs incorporate all previous allegations set forth herein.

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

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

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

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

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

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

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

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

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

COUNT TWO

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

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

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

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

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

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

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

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

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

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

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

COUNT THREE

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

111. Plaintiffs incorporate all previous allegations set forth herein.

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

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

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

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

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

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

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

COUNT FOUR

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

119. Plaintiffs incorporate all previous allegations set forth herein.

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

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

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

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

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

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

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

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

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

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

PRAYER FOR RELIEF

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

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

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

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

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

Dated: September 26, 2020

Respectfully submitted,

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

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

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Recent actions of the North Carolina Board of Elections threaten imminent and irreparable injury to the voters of this state, candidates running for election in November 2020, political parties, and all other persons invested in the political process. With over a million absentee ballots already requested for the election, and hundreds of thousands sent to voters, the Board has usurped the authority of the North Carolina General Assembly by unilaterally cutting a back room deal with Plaintiffs' political adversaries that will have the effect of eviscerating statutes guaranteeing a fair election. The harm is occurring now, and unless these actions are immediately enjoined, the harm will be irreparable.

The United States Constitution requires the North Carolina General Assembly to set the time, place, and manner for elections in the state and for choosing this state's presidential electors. *See* U.S. Const. art. I, § 4, cl. 1, art. II, § 1. Consistent with that authority, the General Assembly enacted and continues to modify a comprehensive election code. *See generally* N.C.G.S. § 163. It also created a Board of Elections ("BOE") to supervise elections with express limits on the BOE's power. Although the BOE has certain "emergency powers" and the power to make "reasonable rules and regulations," the BOE is required to avoid unnecessary conflict with the election code. N.C.G.S. §§ 163-27.1; 163-22(a).

In June 2020, the General Assembly responded to the COVID-19 pandemic by enacting HB 1169, which adapts the requirements and procedures for voting in the November 2020 election to the current circumstances. HB 1169 temporarily relaxes certain voting restrictions and appropriates additional funding so that the election may be conducted in a safe, efficient, and fair manner. The General Assembly considered many proposals before finalizing the bill, including several from the BOE. No side got everything it wanted, and a bipartisan compromise was reached that carefully balanced competing interests.

Although several partisan groups filed lawsuits in North Carolina state and federal court challenging the legislation, the two courts that have already addressed the issues left virtually all provisions intact. *See Democracy North Carolina v. North Carolina State Bd. of Elections*, No. 1:20-cv-457, 2020 WL 4484063, at *64 (M.D.N.C. Aug. 4, 2020) (granting limited relief but denying, among other things, a request for injunctive relief against witness requirement for absentee ballots); Leland Decl., Ex. 1, *Chambers v. N.C.,* Case No. 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Sept. 3, 2020) (denying request to enjoin witness requirement for absentee ballots).

Then, on September 22, with only 42 days until the November 3 general election, and ***after absentee voting had already begun***,[1] the BOE effectively rewrote important absentee voting provisions. It did so through a proposed Consent Judgment negotiated with the plaintiffs in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, No 20-CVS-8881 (Sup. Ct. Wake Cnty.), and three accompanying "Numbered Memos" of instruction to North Carolina County Boards of election. *See* Leland Decl., Ex. 2, Plaintiffs' and Executive Defendants' Joint Mot. for Entry of a Consent Judgment. In particular, the BOE's modifications purport to: (1) extend the deadline for receipt of mailed-in ballots from three days after election day, as plainly specified in the statute, to nine days after election day; (2) emasculate the statutory requirement that only mailed ballots postmarked by 5:00 p.m. on election day be counted; (3) effectively eliminate the statutory requirement that one person witness an absentee ballot; and (4) neuter restrictions on who can handle and return completed ballots. Many of these changes were specifically rejected by the General Assembly in June, and they are not necessary responses to COVID-19.

[1] State officials began mailing out ballots on September 4. *See* N.C.G.S. § 163-230.1(c).

Moreover, the purported "consent judgment" appears to be part of a nation-wide strategy formulated by lawyers for the Democratic National Committee. Ironically dubbed the "Democracy Docket," the group is funded by unreported contributions. As Marc Elias, the Democratic Party's top election lawyer and founder of Democracy Docket, put it, if litigation could lead to an increase of "1 percent of the vote [for Democrats], that would be among the most successful tactics that a campaign could engage in." Leland Decl., Ex. 3, Marc Elias Tweet. The "Democracy Docket" boasts that it has sponsored 56 lawsuits in 22 states around the country by Democratic Party committees and their allies to rewrite election laws in the state and federal courts. Leland Decl., Ex. 4, Marc Elias, "Committed to Justice," On the Docket Newsletter (Sept. 2020). But rather than litigating those cases to conclusions—because they might and most often do lose on their challenges, as they have in North Carolina—their emerging strategy is to cut backroom deals with friendly state election officials to eliminate statutory protections against fraud, sow confusion among the electorate and election officials, and extend the November 2020 election into mid-November or beyond. Already, this strategy has played out in purported "consent decrees" entered with complicit election officials in Rhode Island,[2] Virginia[3], Minnesota,[4] Arizona,[5] and Georgia.[6] This is an effort to take responsibility for election laws from the state legislatures, where it is vested by Article I, section 4 of the Constitution, and place it in the courts.

A temporary restraining order is required. The BOE's "Numbered Memos" that are an integral part of the backroom deal purport to be effective immediately, and with 1,028,648 requests

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

[3] Leland Decl., Ex. 5, *League of Women Voters of Va. v. Va. State Bd.*, 20-cv-24, (W.D. Va. Aug. 21, 2020).

[4] Leland Decl., Ex. 6, *LaRose v. Simon*, 62-CV-20-3149, (Ramsey Cty. Dist. Ct. July 17, 2020).

[5] Leland Decl., Ex. 7, *Voto Latino Found. v. Hobbs*, 2:29-cv-05685 (D. Az. June 18, 2020).

[6] Leland Decl., Ex. 8, *Democracy Party of Georgia, et al. v. Raffensperger, et al.*, 19-cv-05028-WMR, Compromise Settlement Agreement, Dkt. 56-1 (D. Ga. Mar. 6, 2020).

for absentee ballots already submitted through September 26,[7] and hundreds of thousands of absentee ballots already sent out, voters, like the individual Plaintiffs, are—right now, today—confronted with two election regimes—one legitimately enacted by the General Assembly, and one constructed by a rogue Executive Branch Commission.

Moreover, Plaintiffs are likely to succeed on the merits of their claims and will suffer irreparable harm if relief is not granted. The Republican Committees have expended considerable resources to get out the vote for their preferred candidates in North Carolina and to educate voters about North Carolina's election laws. They have already contacted, through door knocking, telephone calls, or mailings, more than 7.6 million households in North Carolina with pleas to vote for the Republican ticket and instructions on how to do so in accord with the legitimate election regime. These investments will be wasted if the BOE's changes remain in place. And the individual Plaintiffs either have voted or plan to vote in the upcoming election. The BOE's unilateral changes to North Carolina's voting laws—after absentee voting has already begun—will also cause widespread voter confusion. The remaining equities, which include North Carolina's interests in promoting fair and honest elections, safeguarding voter confidence in the integrity of election results, and administering orderly elections further necessitate a temporary restraining order. Against these equities, the BOE's unconstitutional and ultra vires actions carry no weight.

BACKGROUND

A. North Carolina's Election Code and the BOE's Role in Administering Elections

Today, North Carolina offers its citizen three ways to vote: (1) absentee voting by mail-in ballot, (2) in-person early voting, and (3) in-person voting on Election Day. The General Assembly

[7] Current number of absentee ballot requests available at https://www.ncsbe.gov/.

created the option for absentee voting in 1917,[8] and more recently expanded the absentee voting option to allow "no excuse" absentee voting; now anyone can vote absentee simply by complying with the safeguards enacted by the General Assembly. The availability of these three options maximizes election participation, but each is also regulated to ensure that elections are fair, honest, and secure.

The first option is to vote by absentee ballot. *See generally* N.C.G.S. § 163 art. 20. The BOE purported to modify this method through its Consent Judgment and Numbered Memos. North Carolina allows "[a]ny qualified voter of the State [to] vote by absentee ballot in a statewide . . . general . . . election." *Id.* § 163-226(a). Given the consensus that mail-in ballots present a higher risk of fraud than ballots submitted in person,[9] North Carolina enacted measures to deter and detect fraudulent mail-in ballots. As relevant here, the voter must complete and certify the ballot-return envelope in the presence of two witnesses (or a notary), who must certify "that the voter is the registered voter submitting the marked ballot[]" (the "Witness Requirement"). *Id.* § 163-231(a). The voter (or a near relative or verifiable legal guardian) can then deliver the ballot in person to the county board office or transmit the ballot "by mail or by commercial courier service, at the voter's expense, or delivered in person" not "later than 5:00 p.m. on the day of the" general election. *Id.* § 163-231(b)(1). A ballot would be considered timely if it was postmarked

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[8] *See Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 347 (1920).

[9] For example, a commission chaired by President Jimmy Carter and former Secretary of State James A. Baker, III found that voting by mail is "the largest source of potential voter fraud." Leland Decl., Ex. 9, Carter-Baker Report, at 46. Other commissions have reached the same conclusion, finding that "when election fraud occurs, it usually arises from absentee ballots." Leland Decl., Ex. 10, Morley Redlines Article, at 2. This is true for a number of reasons. For instance, absentee ballots are sometimes "mailed to the wrong address or to large residential buildings" and "might get intercepted." Leland Decl., Ex. 9, Carter-Baker Report, at 46. Absentee voters "who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id*. And "[v]ote buying schemes are far more difficult to detect when citizens vote by mail." *Id*. As one court put it, "absentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

by election day (the "Postmark Requirement") and received "by the county board of elections not later than three days after the election by 5:00 p.m." (the "Receipt Deadline"). *Id.* § 163-231(b)(2)(b). With limited exceptions, North Carolina law prohibits anyone except the voter's near relative or legal guardian from assisting a voter with the completion and submission of an absentee ballot (the "Assistance Ban" and "Ballot Delivery Ban"). *Id.* § 163-226.3.

The second option for North Carolina voters is one-stop early voting. *See id.* § 163-227.6. Under this provision, county boards can establish one or more early-voting locations, which the BOE must approve. *Id.* § 163-227.6(a). Those locations open on the third Thursday before Election Day, and early voting must be conducted through the last Saturday before the election. *Id.* § 163-227.2(b). North Carolina law mandates the hours at which the early voting sites must open, and requires that if "any one-stop site across [a] county is opened on any day . . . all one-stop sites shall be open on that day" ("Uniform Hours Requirement"). *Id.* § 163-227.6(c)(2).

The third option is in-person voting on election day. *See generally* § 163 art. 14A. As with the other two methods of voting, the General Assembly has prescribed a series of rules, to be administered by the BOE and county boards, to ensure that in-person voting is fair, efficient, and secure. *See id.*

The General Assembly created the BOE and empowered it with "general supervision" of elections and the authority "to make such reasonable rules and regulations" for elections. *Id.* § 163-22(a). The BOE's rules cannot "conflict with any provisions of" North Carolina's election code. *Id.* That is true even where exigent circumstances require the BOE to pass temporary rules or exercise emergency powers. The BOE can promulgate temporary rules should any provision of North Carolina's election code be held unconstitutional, provided that those rules "do not conflict with any provisions of . . . Chapter 163 of the General Statutes and such rules and

regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly." *Id.* § 163-22.2. And while, "upon recommendation of the Attorney General," the BOE can "enter into agreement with the courts in lieu of protracted litigation," it can only do so "until such time as the General Assembly convenes." *Id.*

The Executive Director may also exercise "emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by . . . [a] natural disaster[,] [e]xtremely inclement weather[, or certain] armed conflict[s]." N.C.G.S. § 163-27. These powers are similarly limited. The statute provides that in exercising this power, "the Executive Director ***shall*** avoid unnecessary conflict with the provisions of" the voting code. *Id*. (emphasis added). The statutory provisions concerning the BOE confirm that it cannot pass rules that conflict with North Carolina's election code.

B. The General Assembly Responds to the COVID-19 Pandemic

The General Assembly took decisive action in response to the COVID-19 pandemic and enacted HB 1169, which passed into law on June 12, 2020. The bill modified voting laws for the 2020 election and appropriated funding to ensure the election may be conducted in a safe, efficient, and fair manner.

Before enacting HB 1169, the Assembly spent a month and a half working on the bill[10] and considered many proposals. The BOE advanced several, including a proposal to reduce or eliminate the witness requirement for absentee ballots. Leland Decl., Ex. 12, State Bd. Mar. 26, 2020 Ltr. at 3. Moreover, the General Assembly had the benefit of information about other primary elections conducted during the pandemic, as well as reports of challenges faced by the United States Postal Service ("USPS"). The General Assembly was also familiar with the recent election

[10] Leland Decl., Ex. 11, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3.

in North Carolina's Ninth Congressional District, which was tainted by "absentee ballot fraud" and needed to be held anew, and from that incident understood the importance of restricting who can assist voters with the request for, filling out, and delivery of absentee ballots. *See* Leland Decl., Ex. 13, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019).

HB 1169 passed with overwhelming bipartisan majorities, by a vote of 105-14 in the House and by a vote of 37-12 in the Senate,[11] and was signed by Governor Cooper. Members lauded the bill: As Democrat representative Allison Dahle remarked, "[n]either party got everything they wanted," but the "compromise bill" was "better for the people of North Carolina."[12] For the November 2020 election, among other things, the General Assembly:

- Reduced the number of witnesses required for absentee ballots to one person instead of two, HB 1169 § 1.(a).
- Allowed voters to call the State or county board of elections to request a blank absentee ballot request form be sent to the voter via mail, e-mail, or fax. *Id* § 5(a).
- Enabled voters to request absentee ballots online. *Id.* § 7.(a).
- Allowed completed requests for absentee ballots to be returned in person or by mail, e-mail, or fax. *Id.* § 2.(a).
- Permitted "multipartisan team" members to help any voter complete and return absentee ballot request forms. *Id.* § 1.(c).
- Provided for a "bar code or other unique identifier" to track absentee ballots. *Id.* § 3.(a)(9).
- Appropriated funds "to prevent, prepare for, and respond to the coronavirus pandemic during the 2020 federal election cycle." *Id*. § 11.1.(a).

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11 Leland Decl., Ex. 14, HB 1169, Voting Record.

12 *See* Leland Decl., Ex. 11, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

These changes balanced the public health concerns of the pandemic against the legitimate needs for election security. To balance the public health concerns against the interests in election security and orderly administration, the General Assembly retained several provisions, including (1) the Postmark Requirement, (2) the three-day Receipt Deadline, (3) the Assistance Ban and Ballot Delivery Ban, and (4) a reduced one-person Witness Requirement.

C. The Republican Committee's Voter Education and Get out the Vote Efforts

Since the enactment of SB 1169, the Republican Committees have invested significant resources, time, and effort in educating voters about North Carolina's voting procedures and regulations in order to ensure that Republicans' votes are successfully counted in the November election. *See* Leland Decl., Ex. 15, Dore Decl. ¶¶ 11-13; Leland Decl., Ex. 16, White Decl. ¶¶ 7-10; Leland Decl., Ex. 17, Dollar Decl. ¶¶ 10-11; Leland Decl., Ex. 18, Clark Decl. ¶¶ 7-9. For example, the NCRP spent $250,000 in support of door-knocking efforts to educate voters, and over $2.2 million on direct mail campaigns to educate over 7.6 million North Carolina households about absentee ballot procedures. Dore Decl. ¶¶ 11, 13. The RNC also set up four Victory Headquarters Field Offices in North Carolina and has approximately 16 paid staff working on voter education in the state. White Decl. ¶ 9. The Republican Committees prioritized their strategic activities in reliance on North Carolina's established voting laws. *See* Dore Decl. ¶¶ 14-15; White Decl. ¶¶ 11-12; Dollar Decl. ¶¶ 12-13; Clark Decl. ¶ 10. The BOE's recent modifications to those voting laws will largely negate the Republican Committees' previous efforts, require them to educate voters about the voting changes, and cause the Republican Committees to suffer enormous financial loss. *See* Dore Decl. ¶¶ 14-15; White Decl. ¶¶ 11-12; Dollar Decl. ¶¶ 12-13; Clark Decl. ¶ 10.

D. The Coordinated Litigation Effort To Subvert HB 1169 and Alter North Carolina's Election Procedures

The General Assembly's bipartisan action to combat the COVID-19 pandemic's impact on the November election was not enough for certain Democratic Party operatives, who saw in the COVID-19 pandemic a way to legislate through the courts. *E.g.,* Leland Decl., Ex. 19, Eric Holder: Here's How the Coronavirus Crisis Should Change U.S. Elections—For Good, TIME (Apr. 14, 2020) ("Coronavirus gives us an opportunity to revamp our electoral system . . ."). In North Carolina alone, Democratic Party committees and related organizations have filed seven lawsuits attacking various aspects of North Carolina's election code. Plaintiffs in many of these cases filed motions to preliminarily enjoin certain aspects of HB 1169 and the North Carolina election code.

The first North Carolina decision came in *Democracy North Carolina*, 2020 WL 4484063. Several organizations and individuals sued the BOE and moved for a preliminary injunction, claiming that numerous provisions of North Carolina's election code, including the Witness Requirement, Receipt Deadline, Postage Requirement, Assistance Ban, and Ballot Delivery Ban, violated federal constitutional and statutory law. *See id.* at *5–10. The President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives ("Legislative Defendants") intervened to defend the General Assembly's election laws, and the Republican Committees appeared as *amici.* *See id.* *3. On August 4, after a three-day evidentiary hearing and extensive argument, the district court issued a comprehensive 188-page opinion and order. *See generally id.* The court rejected nearly all of the claims, finding that plaintiffs could not show a likelihood of success on the merits. *See id.* *1, 64. For instance, the court rejected the challenge to the Witness Requirement because even elderly, high-risk voters could fill out a ballot in a short period of time and have the witness observe the process from a safe distance, thereby significantly reducing any risk of COVID-19 transmission. *Id.* at *24–33; *see also id.* at *52

(finding that the Ballot Delivery Ban was related to the legitimate purpose of "combating election fraud" and would likely be upheld). Moreover, the court found that even if certain procedures did "present an unconstitutional burden under the circumstances created by the COVID-19 pandemic," it was not the court's role to "undertake a wholesale revision of North Carolina's election laws," particularly so close to an election. *See id.* at *45 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006)).

Although the district court denied nearly all of the plaintiffs' claims, it did find that they were likely to succeed on two issues. First, the court found that one plaintiff (an elderly, blind nursing home resident) was likely to succeed on a Voting Rights Act claim challenging North Carolina's limitation on who could assist him with completing his ballot. *Id.* at *55, 61. Second, the court found that plaintiffs were likely to succeed in showing that North Carolina's lack of a notification and cure procedure for deficient absentee ballots violated procedural due process. *Id.* at *55. The court accordingly enjoined the Board "from allowing county boards of elections to reject a delivered absentee ballot without notice and an opportunity to be heard until" the Board could implement a uniform cure procedure. *Id.* at *64.

The BOE responded to the court's procedural due process ruling by issuing Numbered Memo 2020-19 (Leland Decl., Ex. 20), which (1) eliminated the requirement that county boards match the signature on the ballot to the voter's signature on file and (2) defined a cure procedures for deficient absentee ballots. *Id.* §§ 1, 2. A voter's failure to sign the voter certification or signing the certification in the wrong place could be cured through an affidavit. *Id.* § 2.1. Affidavits could not cure deficiencies related to the Witness Requirement, meaning the ballot would be spoiled and a new one issued to the voter. *Id.* Collectively, these procedures will be called the "Cure Process."

Notwithstanding the federal court's extensive ruling, which upheld the vast majority of the challenged provisions, as well as the Board's prompt action in implementing the Cure Process, the Democratic Party and related organizations remained undeterred. They continued to press forward with five lawsuits in North Carolina state court challenging many of the same provisions upheld in *Democracy North Carolina*, including one claiming that the Cure Process violated North Carolina's Constitution because it arbitrarily distinguished between voters.[13] All of those lawsuits were filed against the BOE, and the Legislative Defendants were granted intervention in each case. In all of those lawsuits except *Chambers*, Mr. Elias and the Perkins Coie law firm represented the plaintiffs against the BOE.

The second decision to address a motion to enjoin certain aspects of HB 1169 was *Chambers,* which challenged the Witness Requirement. On September 3, a three-judge panel[14] denied Plaintiffs' motion to preliminarily enjoin the Witness Requirement. *See* Leland Decl., Ex. 1, *Chambers*, Case No. 20-CVS-500124. After briefing with evidentiary submissions and an oral hearing, the panel held that there was not a substantial likelihood the plaintiffs would prevail on the merits. *Id*. at 6. Furthermore, it held that "the equities do not weigh in [plaintiffs'] favor" because of the proximity of the election, the tremendous costs that the plaintiffs' request would impose on the State, and the confusion it would cause voters. *Id.* at 7. Specifically, the panel determined that changes requested by plaintiffs "will create delays in mailing ballots for *all* North

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13 *See DSCC v. N.C. State Bd. of Elections*, No. 20-CVS-69947 (Sup. Ct. Wake Cnty. Sept. 8, 2020) (challenging Cure Process); *Alliance*, No. 20-CVS-8881 (Sup. Ct. Wake Cnty. Aug. 10, 2020) (challenging the Witness Requirement, Postage Requirement, Receipt Deadline, Application Assistance Ban, Ballot Delivery Ban, and Uniform Hours requirement; *Stringer v. North Carolina*, No. 20-CVS-5615 (Sup. Ct. Wake Cty. May 4, 2020) (challenges similar to those in the *Alliance* case); *Advance North Carolina. v. North Carolina*, No. 20-CVS-2965 (Sup. Ct. Wake Cnty. Mar. 4, 2020) (limitations on who may assist with completion and delivery of absentee ballots); *North Carolina Democratic Party v. North Carolina*, No. 19-CVS-14688 (Sup. Ct. Wake Cnty. Oct. 28, 2019) (Uniform Hours requirement).

14 Under North Carolina law, all challenges to the facial validity of North Carolina statutes must be heard by a three-judge panel in the Superior Court of Wake County. N.C.G.S. § 1A-1, 42.

Carolinians voting by absentee ballot in the 2020 general election and would likely lead to voter confusion as to the process for voting by absentee ballot." *Id.* (emphasis in original).

The Board of Elections then proceeded, pursuant to a statutory requirement, to mail absentee ballots to "more than 650,000" voters who had requested them. *See* Leland Decl., Ex. 21, *The November Election Season Has Officially Started, as North Carolina Begins Sending Out Mail Ballots*, The Washington Post (Sept. 4, 2020) (indicating that on Sept. 4, the North Carolina had already begun mailing out more than 650,000 absentee ballots to voters). As of September 26, 1,028,648 absentee ballots had been requested, and 221,588 completed ballots had been returned.[15]

Notwithstanding defeats in *Democracy North Carolina* and *Chambers*, plaintiffs in the remaining cases continued to press forward. The plaintiffs in *Alliance* filed a preliminary injunction motion on August 21, and submitted supporting papers on September 4. Opposition briefs were due on September 28, with a preliminary injunction hearing scheduled for October 2. During that time, the Legislative Defendants and State Defendants began deposing fact and expert witnesses.[16] The Republican Committees, who were awaiting a ruling on their intervention motion, also participated in those depositions.

E. The BOE's Consent Judgment with the *Alliance* Plaintiffs

During the time that the Legislative Defendants and Republican Committees were engaged in depositions, the State Defendants conducted secret settlement negotiations with the *Alliance* plaintiffs. Not until one of the plaintiffs' witnesses failed to show up for her deposition did the

15 *See* https://www.ncsbe.gov/ for a current number of requested ballots; Leland Decl., Ex. 22, BOE Absentee Data.

16 The depositions were not completed. After the plaintiffs and the State Board defendants announced the deal, plaintiffs refused to allow any further witnesses to be deposed.

plaintiffs inform the Legislative Defendants and Republican Committees of the deal. Those negotiations resulted in the plaintiffs and BOE's agreeing to the Consent Judgment, which it submitted to the court for approval on September 22. Pursuant to the Consent Judgment, the plaintiffs agreed to drop their claims against the BOE in exchange for the BOE's implementing significant changes to North Carolina's election code for the November general election. A hearing on the joint Consent Judgment motion is scheduled for October 2. However, it appears that the BOE has deemed its new "Numbered Memos" to be immediately effective.

Under the deal, the BOE implemented changes to North Carolina's election code by revising Numbered Memo 2020-19 (which established the Cure Process) and issuing new memos to county boards. Revised Numbered Memo 2020-19 now (1) requires county boards to accept a ballot signature as long as it appears to have been made by the voter and (2) allows voters to cure a ballot that is deficient due to a lack of signature, problem with the voter's contact information, or problem with the witness's certification (for instance, the witness failed to sign the ballot) by submitting a cure affidavit. *See* Leland Decl., Ex. 23, Revised Numbered Memo 2020-19.

The Board also issued Numbered Memo 2020-22, which applies only to "remaining elections in 2020," and provides that absentee ballots are timely if "(1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m." Leland Decl., Ex. 24, Numbered Memo 2020-22. In addition to tripling the Receipt Deadline from the statutory requirement of three days after Election Day to nine days, the BOE eliminated the Postmark Requirement by providing that a ballot is considered "postmarked" if there is information in a tracking service showing that the ballot was "in the custody of USPS or the commercial carrier on or before Election." *Id.*

Finally, the Board issued Numbered Memo 2020-23, which affirms that absentee ballots cannot be left in an unmanned drop box, but then negates that restriction by stating that county boards cannot "disapprove a ballot solely because it is placed in a drop box." Leland Decl., Ex. 25, Numbered Memo 2020-23. Furthermore, the Board ignored North Carolina's strict statutory limits on who may deliver a completed absentee ballot by instructing county boards that they cannot "disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot." *Id.*

LEGAL STANDARD

A party seeking a temporary restraining order must establish a likelihood of success on the merits, irreparable harm without relief, that the balance of equities tips in plaintiff's favor, and that an injunction is in the public interest. *Wilson v. Thomas*, No. 5:14-CV-85-BO, 2014 WL 5307491, at *1 (E.D.N.C. Oct. 16, 2014); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

ARGUMENT

I. THE BOE'S CHANGES TO NORTH CAROLINA ABSENTEE BALLOT LAWS VIOLATE THE UNITED STATES CONSTITUTION

A. The Elections and Electors Clauses in the United States Constitution Require State Legislatures to Regulate Elections.

The Elections Clause of the United States Constitution, mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., art. I, § 4, cl. 1. Courts have long understood that to fulfill that obligation and to ensure that elections are "fair and honest" and conducted with "some sort of order, rather than chaos," state legislatures must enact "substantial regulation." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (*quoting Storer v. Brown*, 415 U.S. 724, 730 (1974)); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 604-05 (4th Cir. 2016) (same). Furthermore, the

Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const., art. II, § 1, cl. 2.

On June 11, 2020, the General Assembly fulfilled its constitutional obligations and passed HB 1169 by a strong bipartisan vote of 105-14 in the House and 37-12 in the Senate, and the bill was signed into law the next day. *See* Leland Decl., Ex. 14, HB 1169. HB 1169 made several changes to the election laws to address potential issues from COVID-19, including addressing some of the same absentee ballot regulations the BOE seeks to modify now. *See* p. 8 above.

The question of the time, place, and manner in which to conduct the election in November implicates many sensitive public policy issues that by their nature are more properly considered, balanced, and resolved by the collective judgment of the General Assembly than by the BOE. That is exactly what the General Assembly did. The BOE's Consent Judgment and Numbered Memos do not raise new issues that the General Assembly failed to consider, and it would not matter if they did. Before HB 1169 passed, the BOE had already proposed to the General Assembly reducing or eliminating the witness requirement for absentee ballots. Leland Decl., Ex. 12, State Bd. Mar. 26, 2020 Ltr. at 3 ("Reduce or eliminate the witness requirement"). Moreover, the General Assembly had the benefit of information about primary elections conducted during the pandemic and USPS's challenges. The General Assembly was also familiar with the recent North Carolina election tainted by "absentee ballot fraud" that needed to be held anew, along with the importance of banning ballot harvesting. *See* Leland Decl., Ex. 13, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019). Considering all this, the General Assembly made policy judgments about how to address each of those issues. Even though not every legislator got what he or she wanted, and even though the BOE may have recommended different solutions, HB 1169 reflects careful consideration of how

the pandemic will affect voting in North Carolina in 2020, was overwhelmingly adopted with a bipartisan majority, and under our Constitutional system is an appropriate resolution.[17]

Deference to state legislatures and their policy compromises is especially important this close to an election. The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207, 206 L. Ed. 2d 452 (2020) (*citing Purcell*, 549 U.S. 1); *Frank v. Walker*, 574 U.S. 929, 135 S.Ct. 7, 190 L. Ed. 2d 245 (2014); *Veasey v. Perry*, 574 U. S. ——, 135 S.Ct. 9, 190 L. Ed. 2d 283 (2014)). Indeed, on several occasions this summer, the Supreme Court has stayed lower-court preliminary injunctions that would have changed voting regulations in response to the pandemic just before the election. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 207 (2020) (staying injunction of Wisconsin election requirements including deadline for state's receipt of absentee ballots and emphasizing that "lower federal courts should ordinarily not alter the election rules on the eve of an election."); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897 (U.S. July 30, 2020) (staying injunction extending Idaho deadline for accepting ballot-initiative signatures and permitting digital collection of signatures); *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742, at *1 (U.S. Aug. 11, 2020) (staying injunction against Oregon initiative signature requirement); *Merrill v. People First of Ala.*, No. 19A1063, 2020 WL 3604049, at *1 (U.S. July 2, 2020) (staying injunction against absentee ballot witness requirement and other Alabama voting regulations).

[17] *See* Leland Decl., Ex. 11, Jordan Wilkie, NC House Passes Bipartisan Election Bill To Fund COVID-19 Response, Carolina Public Press (May 29, 2020) ("Neither party got everything they wanted," but the "compromise bill" was "better for the people of North Carolina.").

B. The BOE Has Usurped the General Assembly's Authority.

The BOE does not have the authority to pass rules that plainly conflict with North Carolina's election code. In the Consent Judgment, the BOE relies on its "emergency powers" as the source of its authority for the changes. Leland Decl., Ex. 2, *Alliance*, No. 20-CVS-8881, Stipulation and Consent Judgment, at *10. But this effort to invoke emergency powers is misguided. The General Assembly considered substantial evidence about the pandemic and USPS's challenges and rejected essentially the same proposals that the BOE has now purported to adopt. In short, the General Assembly has already addressed whatever "emergency" the BOE is purporting to resolve with the backroom deal.

Moreover, the BOE's emergency powers are specifically limited. In exercising its authority under those powers to conduct an election during "a natural disaster," the General Assembly has provided that "the Executive Director ***shall*** avoid unnecessary conflict with the provisions of" the voting code. N.C.G.S. § 163-27.1 (emphasis added). Similarly, although N.C.G.S. § 163-22(a) provides that the BOE "shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable," that authority is also limited by the requirement that the rules and regulations "do not conflict" with the state's voting code. *Id*.

The Consent Judgment and Numbered Memos plainly modify several material components of the time, place, and manner statutes enacted by the General Assembly for absentee mail ballots. On these issues the Board is entitled to no deference under the Constitution, and if any deference was due, no amount of deference would salvage the Board's backroom deal, which illegally adopts several changes to the law that the General Assembly expressly rejected this summer.

Receipt deadline. The BOE's changes to the Receipt Deadline plainly conflict with the controlling statute. The statute enacted by the General Assembly requires that absentee ballots be

delivered by 5:00 p.m. on election day, or if they are mailed by the USPS, that they are postmarked by election day and received **no later *than three days after election day*** (by Nov. 6, 2020) by 5:00 p.m. N.C.G.S. § 163-231(b)(2). Flouting this directive, Numbered Memo 2020-22, purports to extend the deadline by six days: "An absentee ballot shall be counted as timely if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by ***nine days after the election***, which is Thursday, November 12, 2020 at 5:00 p.m." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 1.

Since the General Assembly explicitly and responsibly revisited the North Carolina Election Code to address concerns about COVID-19 and USPS challenges, any suggestion by the Board that this change was necessitated by those issues[18] would confirm its intent to usurp authority from the General Assembly. The Consent Order expresses concern that, due to the current mail processing rates by the USPS, completed ballots mailed on election day will not arrive in time to be counted three days later, as required by statute. *E.g.*, Leland Decl., Ex. 2, *Alliance*, No. 20-CVS-8881, Stipulation and Consent Judgment, at **7-10. However, it is wholly within each voter's control to avoid unnecessary delays before mailing a completed ballot. Indeed, voters have been instructed by USPS and the BOE, among others, to request and return ballots as early as possible within the more than 60-day window before the receipt deadline. Leland Decl., Ex.

[18] Plaintiffs' expert in the *Alliance* case testified that he was not aware that the Postal Service is currently experiencing any problems in North Carolina during the current absentee voting period. (Leland Decl., Ex. 26, Deposition of Kenneth R. Mayer at 80.) He also could not testify as to any instances where the Postal Service had failed to deliver an absentee ballot in North Carolina for insufficient postage, and was unaware of any North Carolinian who declined to vote because of confusion as to how much postage to affix to a ballot return envelope. *Id.* at 104-06. Mayer also acknowledged that it is the Postal Service's policy to deliver absentee ballots even if they are unstamped. *Id.* at 106. Finally, he had no reason to question statistics showing that in 2019 the Postal Service delivered an average of approximately 472 million mail pieces per delivery day, and that even if every registered voter in the United States voted by mail (about 155 million ballots), those ballots would represent only a small fraction of the total volume of mail. *Id.* at 106-07.

27, Plunkett Aff. at ¶ 28; *see also* N.C. Gen. Stat. § 163-227.10(a). If they wait until the last day to return their completed ballots, they may also return them in person. N.C.G.S. § 163-231(b)(1). But even if a voter does wait until the last permitted hour of election day to mail his or her ballot, USPS will be able to process mail ballots within the time parameters set by North Carolina voting statutes. First, in North Carolina, more than 95% of Presort First-Class Mail is delivered within 2 days, Plunkett Aff. at ¶ 17, and no First-Class Mail in the state has more than a three-day service standard, *id*. at ¶ 18. Second, USPS's ability to deliver mail in a timely fashion will not be impacted by an increased volume of mail ballots for several reasons. *Id*. at ¶¶ 33-35. Third, USPS has established procedures and processes for delivering election mail and has a plan for the upcoming election in North Carolina. *Id*. Thus, even for voters who irresponsibly procrastinate to request and mail their ballots, it is highly likely that USPS will deliver their ballots on time. *Id*. at ¶ 14.

Witness requirement. The BOE has also eviscerated the critical Witness Requirement. The General Assembly revised the voting regulations for the 2020 election to reduce the requirement that two individuals witness a voter's absentee ballot to a one-witness requirement. HB 1169 § 1.(a). The BOE's Numbered Memo 2020-19 goes further and would allow an absentee ballot for which the witness or assistant did not print his or her name or address, or sign the ballot, to be cured by a voter a certification. Leland Decl., Ex. 23, Revised Numbered Memo 2020-19 at 2. A voter who submits an absentee ballot without a witness will be sent a certification for ***the voter to sign***, and upon receipt of that certification (but no witness), BOE will count the ballot. When drafting HB 1169, the General Assembly rejected this very outcome when it rejected the BOE's proposal to eliminate the witness requirement. *See* Leland Decl., Ex. 28, State Bd. Apr. 22, 2020 Ltr. at 3; Leland Decl., Ex. 12, State Bd. Mar. 26, 2020 Ltr. at 3.

Again, it would be cynical for the Board to argue that COVID-19 necessitates eliminating or neutering this requirement. The General Assembly expressly considered—and indeed made—changes to the Witness Requirement to address the COVID-19 pandemic. The BOE's backroom deal to eliminate the requirement entirely is an *ultra vires* power grab that offends the Constitution and that the pandemic does not require. As explained (pp. 10-12 above), two courts have already sustained the witness requirement against pandemic-related challenges.

Postmark requirement. The BOE's modification to the postmark requirement also plainly contradicts the controlling statute. With respect to absentee ballots that are mailed by USPS and received within three days of the election, the General Statutes require that the ballots be "postmarked" on or before the election day by 5:00 p.m. N.C.G.S. § 163-231(b)(2). However, for remaining elections in 2020, which could include run-offs as well as the November 3 election, the BOE has unilaterally declared that a ballot "shall be considered postmarked by Election Day if it has a postmark affixed to it *or if there is information in BallotTrax, or another tracking service* offered by the USPS or a commercial carrier, *indicating* that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 2 (emphasis added). This rewrites the plain meaning of the statute. A "postmark" is "[a]n official mark put by the post office on an item of mail to cancel the stamp and to indicate the place and date of sending or receipt." Postmark, Black's Law Dictionary (11th ed. 2019).[19] The General Assembly has also refused to enact similar changes. Another bill, HB 1184, included a similar proposal, among other items on the Democrats' "wish list,"[20] and was not enacted.[21] HB

[19] *See* also USPS processing guidelines, https://about.usps.com/handbooks/po408/ch1_003.htm.
[20] Leland Decl., Ex 11, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).
[21] *Id*.

1184 would have similarly amended the voting statute such that "absentee ballots that are received without a postmark through the United States Postal Service mail system shall be deemed properly cast and accepted and counted up to three days after the general election." HB 1184 § 3.6. Once again, this intentionally overrides the General Assembly.

Moreover, the Board's rewrite is as porous as Swiss Cheese: What "information" is sufficient to "indicate" that a ballot was in the "custody" of the USPS on Election Day? What other "tracking services" besides BallotTrax has the Board decided to look at to deem a ballot in USPS custody. The Board doesn't say. Coupled with the extended receipt deadline, it is not difficult to see where this is going: under the BOE's regime, election officials will be debating what constitutes sufficient information to indicate that a ballot was in custody of the USPS until mid-November and beyond. Postmarks will be the 2020 version of hanging chads.

Ballot delivery and assistance bans. The BOE's modification to the ballot delivery ban also plainly contradicts the voting statutes. Completed mail ballots may be returned in person by the voter, the voter's near relative or verifiable legal guardian, or by mail using USPS or a commercial courier. N.C.G.S. §§ 163-229(b); 163-231(a)-(b); HB 1169 §§ 1.(a), 2.(a). It is a class I felony for any other person to take possession of an absentee ballot of another voter for deliver or return to a county board of elections. N.C.G.S. § 163-223.6(a)(5). With limited exceptions, North Carolina law also prohibits anyone except the voter's near relative or legal guardian from assisting a voter with the completion and submission of an absentee ballot. N.C.G.S. § 163-226.3. The BOE would effectively neuter these protections. Numbered Memo 2020-23 provides that "[a] county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot" and that "a county board may not disapprove a ballot solely because it is placed in a drop box." Leland Decl., Ex. 25, Numbered Memo 2020-23 at 2-

3. This is not a change necessitated by COVID-19. Stamps are widely available, *see* Leland Decl., Ex. 27, Plunkett Aff. ¶¶ 32-34, and there is no reason voters could not mail their ballots.

One need look no further than the Dowless scheme in District 9 to see the justification for the harvesting ban and not accepting ballots tainted by harvesting. That scheme took years to uncover and led to the invalidation of a congressional election. The BOE's deal opens the door to similar schemes to fraudulently "harvest" ballots from vulnerable communities. The Numbered Memos do not merely enforce or interpret the law, they modify it in significant, material, and unnecessary ways. And the BOE lacks the authority to do so.

C. The Fourteenth Amendment to the U.S. Constitution Prohibits the BOE's Actions, Which Dilute Valid Votes.

Not only has the BOE usurped the General Assembly's legislative power to enact North Carolina's elections laws, but it has done so in a way that violates the fundamental right to vote guaranteed by the Fourteenth Amendment to the U.S. Constitution. If implemented, the BOE's Numbered Memos would nullify key safeguards against absentee ballot voting fraud—including the receipt deadline, witness requirement, postmark requirement, and ballot harvesting ban. In the process, the Numbered Memos would increase the risk of voter fraud and dilute the weight of each citizen's vote in North Carolina. The BOE's backroom deal violates the fundamental right for each citizen's vote to be counted on an equal basis and should be invalidated.

The Fourteenth Amendment to the U.S. Constitution protects the "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 77 U.S. 533, 554 (1964). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted" means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (citation omitted); *see also Dunn v.*

Blumstein, 405 U.S. 330, 336 (1972) ("[A] a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (citation omitted).

That is precisely what the BOE's Numbered Memos do here. As shown above, see pages 18-23, the Numbered Memos would nullify four provisions of North Carolina's voting laws: (1) the receipt deadline; (2) the witness requirement for absentee ballots; (3) the postmark requirement; and (4) the ballot harvesting ban. The nullification of each of these requirements would increase the risk of voter fraud in the upcoming general election and all but invite a repeat of the McCrae Dowless fraud that North Carolina experienced in 2018.

Witness Requirement. The witness requirement is an impediment to voter fraud. As the federal court noted in *Democracy North Carolina*, "the One-Witness Requirement plays a key role in preventing voter fraud and maintaining the integrity of elections." *Democracy N.C.*, 2020 WL 4484063, at *35. "[M]uch like an in-person voter is required to state their name and address upon presenting themselves at an in-person polling place; the act of identification, as witnessed by the poll worker, acts as the same deterrent from committing fraud." *Id.* Furthermore, even if a fraudster were determined to violate North Carolina's election laws, the witness requirement would act as a deterrent because it would require the fraudster to enlist a confederate who is also willing to break the law and risk prosecution. *See id.* at *34 (describing the Dowless election fraud case).

Postmark Requirement and Receipt Deadline. The postmark requirement and receipt deadline work in tandem to ensure that North Carolina counts only timely submitted absentee

ballots—rather than absentee ballots that are voted after election day. Far from adhering to North Carolina's statutory requirement that absentee ballots be "postmarked" on or before the election day by 5:00 p.m, *see* N.C.G.S. § 163-231(b)(2), Numbered Memo 2020-22 would permit absentee ballots to be counted so long as "there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 2. Relying on a non-governmental tracking service as a substitute for the postmark requirement would increase the risk of absentee ballots being mailed (and ultimately counted) after election day. *See* Leland Decl., Ex. 29, Ellie Kaufman, "Postmarks Come Under Scrutiny as States Prepare for Mail-In Voting," CNN (Aug. 11, 2020) ("Many states add a postmark requirement to mail-in ballots to ensure that the ballots were sent before or on Election Day, trying to prevent votes submitted after Election Day from being counted.").

Furthermore, the receipt deadline and postmark requirement are an integral part of North Carolina's ability to maintain an orderly election and timely count absentee votes before their canvas deadlines. North Carolina requires the county boards of election to complete their vote canvass by "11:00 A.M. on the tenth day after every election," with the deadline extended to a "reasonable time thereafter," in the event that election officials are unable to complete a vote count despite due diligence. N.C.G.S. § 163-182.5(b). With an enormous increase in absentee ballots expected in the 2020 election, county boards will have an ample challenge to complete their canvass in the six days between the final day for receipt of absentee ballots (three days after the election) and the canvass. Leland Decl., Ex. 30, Summa Decl. ¶ 19. Even if the canvass deadline is extended, a second deadline looms: three weeks after the general election. By that date, the BOE is required "to complete the canvass of votes cast in all ballot items within the jurisdiction of

the State Board of Elections and to authenticate the count in every ballot item in the county." N.C.G.S. § 163-182.5(c). If the State is unable to meet that deadline, then the "State Board may adjourn for not more than 10 days to secure the missing abstracts." *Id*. The ultimate deadline is the federally-imposed deadline of December 14, when the State must certify its electors or else lose its voice in the Electoral College. 3 U.S.C. § 7."). Changing such a tightly structured election process risks undermining its integrity.

Ballot Harvesting Ban. Statutes such as N.C.G.S. § 163-226.3(a)(6) provide further deterrence for those who would interfere with validity of election results through ballot harvesting, because they criminalize absentee ballot collection and delivery on the part of anyone who is not a voter's near relative or verifiable legal guardian. As the BOE itself successfully argued before a federal court just a few months ago, the ballot harvesting ban is an integral component of North Carolina's attempt to deter voting fraud: "North Carolina's restrictions on absentee ballot assistance . . . reduce the risk of fraud and abuse in absentee voting. . ." *Democracy North Carolina*, No. 1:20-cv-00457-WO-JLW, State Opp. to Mot. for Preliminary Injunction, Dkt. 50, at *22 (M.D.N.C. June 26, 2020).

To see the importance of these requirements, the Court need look no further than the 2018 fraud perpetrated by McCrae Dowless, which involved a ballot harvesting scheme that resulted in the invalidation of the election results in North Carolina's ninth congressional district. *Democracy North Carolina*, 2020 WL 4484063, at *34. Dowless and his co-conspirators collected absentee ballot request forms and absentee ballots, falsified absentee ballot witness certifications, discarded ballots from voters suspected of supporting Dowless's disfavored candidate, and submitted forged absentee ballots—all for the purpose of "get[ting] as many Republican votes in before election day as possible." *See id*. The witness requirement and ballot harvesting ban proved to be impediments

that Dowless and his associates attempted to evade by staggering the timing of their submission of the ballots, limiting the number of times a witness's signature appeared on ballots, and keeping the pen colors and dates consistent with those of the absentee voter. Leland Decl., Ex. 13, BOE Order (Mar. 13, 2019) ¶¶ 52–57, 65; *see also* Leland Decl., Ex. 31, Lockerbie Aff. ¶ ¶18, 21 (noting the role that the Witness Requirement played in the state's ability to detect and prosecute the Dowless scheme). Moreover, the Witness Requirement was pivotal to discovery and prosecution of the scheme. *See* Lockerbie Aff. ¶¶ 18, 21. Permitting the BOE's Numbered Memos to take effect and eliminate the witness requirement and ballot harvesting ban would leave North Carolina without the ability to enforce the very requirements that interfered with Dowless's plan, enabled the BOE to discover and investigate the scheme, and ultimately resulted in a new election with valid results.

The General Assembly enacted its absentee voting laws out of concern for these very issues, and the BOE cannot rely on a state interest to defend the constitutionality of its actions for that reason. When reviewing constitutional challenges to election laws under the Fourteenth Amendment, the *Anderson-Burdick* balancing test requires courts to weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests *put forward by the State* as justifications for the burden imposed by its rule . . ." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation marks omitted and emphasis added). Here, the BOE is acting *against* the interests of the State. The General Assembly acted responsibly in responding to the COVID-19 pandemic. The BOE would now override the General Assembly's decision and implement policies the General Assembly considered but declined to adopt, while eliminating others that retained to preserve the integrity of the electoral process. Permitting the BOE to usurp the General

Assembly's authority would violate the fundamental right of North Carolinians to have their votes counted on an equal basis without dilution and undermine their confidence in a fair election.

D. The Deal Creates Two Absentee Voting Regimes in Violation of the Equal Protection Clause to the U.S. Constitution.

If the State Board were to have its way, the nullification of the witness requirement, postage requirement, and ballot harvesting ban would come into effect weeks into the absentee voting process—resulting in the differential treatment of voters who submitted their ballots before and after the State Board's sought-after changes. Such an arbitrary system would violate the Equal Protection Clause's guarantee that "each qualified voter be given an equal opportunity to participate in that election." *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1968).

The Equal Protection Clause of the Fourteenth Amendment requires that North Carolina treat its voters equally to ensure that they are accorded their "right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn*, 405 U.S. at 336. Under the Fourteenth Amendment, the fundamental right to vote "is protected in more than the initial allocation of the franchise." *Bush*, 531 U.S. at 530. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966). "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 530.

The State Board's actions would violate this guarantee by creating a two-tiered absentee ballot voting process, according to which voters who submitted their ballots before the Numbered Memos' release were required to comply with North Carolina law while those voters who submit their ballots afterwards are not. Absentee voting in North Carolina has been well underway since September 4, *see* N.C. Gen. Stat. § 163-227.10(a). Already at least 239,705 absentee ballots,

including that of Plaintiff Patsy Wise, have been returned in compliance with the full range of requirements set forth in HB 1169. Leland Decl., Ex. 22, BOE Absentee Data. Now, weeks into absentee voting, the State Board has issued multiple Numbered Memos that would nullify certain absentee voting requirements entirely, penalizing absentee voters, like Ms. Wise, who have already submitted their ballots in compliance with those requirements. The State Board has offered no legitimate rationale for this policy change, which comes after the State Board has spent months successfully defending the importance of the very absentee voting provisions that it would now nullify. Such an arbitrary, two-tiered absentee voting system constitutes a clear violation of the Fourteenth Amendment's guarantee of equal protection.

II. EQUITY WEIGHS IN FAVOR OF A TEMPORARY RESTRAINING ORDER

The Numbered Memos at issue are already posted on the BOE's website and are purportedly already in effect. A voter relying on the cure process can forego the witness requirement, expecting to cure that ballot defect by submitting an unwitnessed certification. Voters may rely on the Memos to entrust their ballots to unscrupulous ballot harvesters. As election day draws closer, the postmark and ballot receipt deadlines will become critical, and perhaps decisive in some of the elections. The situation is urgent. The changes will cause confusion among many voters, including the Republican Committees' members, and even among election administrators. This will create "incentiv[e]s to remain way from the polls." *Purcell*, 549 U.S. at 4-5. And as shown (p. 9 above), the changes will undermine investments previously made by the Republican Committees.

The remaining equities and public interest also weigh in Plaintiffs' favor. *First*, the General Assembly has already appropriately weighed concerns related to the pandemic and postal service, and its decision deserves deference. *Second*, as shown, the provisions the deal would override are directed at protecting the integrity of the election process. The public interest strongly

favors safeguarding "public confidence in the integrity of the electoral process." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008). *Third*, the State has a compelling interest in promoting the "orderly administration" of elections through laws such as the postmark requirement and receipt deadline. *See id*. at 195. The equities weigh strongly in favor of injunctive relief.

CONCLUSION

For these reasons, Plaintiffs respectfully urge this Court to grant their motion.

Respectfully submitted,

Dated: September 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2020, I electronically filed the foregoing document using the court's CM/ECF system and that I have electronically mailed the documents to all non-CM/ECF participants.

/s/ *R. Scott Tobin*
R. Scott Tobin

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

Civil Action No. 4:20-CV-182

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

Plaintiffs,

v.

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

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Elections Clause of the Constitution—Article I, Section 4, clause 1—says that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. 1, §4, cl. 1 (emphasis added). The Constitution thus entrusts the power to regulate federal elections in the

first instance to the branch of state government that is closest to the people. In North Carolina that is the General Assembly. The aim of this assignment of authority, as John Jay explained to the New York ratification convention, is to ensure that the rules governing federal elections are determined by "the will of the people." 2 *Debates on the Federal Constitution* 327 (J. Elliot 2d ed. 1836).

2. The North Carolina Board of Elections is not the "Legislature," and it is not Congress, yet the Board released three Memoranda, dated September 22, 2020, to set new "Times" and new "Manners" for elections in North Carolina. These Memoranda effectively gut the Witness Requirement, set by the General Assembly in the Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a); extend the Receipt Deadline for ballots to *nine days* after Election Day, undoing the deadline set by the General Assembly in N.C. GEN. STAT. § 163-231(b)(2)(b); water down the Election Day postmark requirement, also set by the General Assembly in N.C. GEN. STAT. § 163-231(b)(2)(b); and revise the procedures for preventing ballot harvesting by making it easier to drop off ballots illegally. By usurping the General Assembly's constitutional prerogative to "[p]rescribe" the "Times, Places and Manners" of the federal election, the Board is violating the Elections Clause.

3. The Board's ad hoc Memoranda changing the rules regulating the ongoing federal election also violate the Equal Protection Clause. As of filing 239,705 North Carolinians have cast their ballots—including 129,464 Democrats and 39,094 Republicans—and 1,028,648 have requested absentee ballots—including 504,556 Democrats and 185,393 Republicans—the vast majority *before* the Board arbitrarily changed the rules. Absentee Data, North Carolina State Board of Elections (Sept. 26, 2020), *available at* https://bit.ly/33SKzAw. The Board is thus administering the election in an arbitrary and nonuniform manner that inhibits voters who have *already* voted

under the previous rules from "participat[ing] in" the election "on an equal basis with other citizens in" North Carolina. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Bush v. Gore*, 531 U.S. 98, 105 (2000)). And the Board's Memoranda allow otherwise unlawful votes to be counted, thereby deliberately diluting and debasing lawful votes. These are clear violations of the Equal Protection Clause of the Fourteenth Amendment.

4. Plaintiffs seek appropriate declaratory and injunctive relief preventing these imminent, if not already ongoing, violations of law.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 18 U.S.C.§§ 1331, 1343, 1357 and 42 U.S.C. § 1983 because this action arises under the Constitution of the United States. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357 and 42 U.S.C. § 1983.

6. Venue is appropriate in this district under 28 U.S.C. § 1391(b) and under Local Rule 40.1(c)(1) because Plaintiff Bobby Heath is a resident of Pitt County in the Eastern District's Eastern Division, Plaintiff Whitley is a resident of Nash County and Plaintiff Swain is a resident of Wake County, both of which are in the Eastern District's Western Division, and Defendants' official offices are in Wake County, which is in the Eastern District's Western Division.

PARTIES

7. Plaintiff Timothy K. Moore is the Speaker of the North Carolina House of Representatives. He represents the 111th State House District. As the leader of the North Carolina House of Representatives, he represents the institutional interests of that body in this case. He appears in his official capacity.

8. Plaintiff Philip E. Berger is the President Pro Tempore of the North Carolina Senate. He represents the State's 30th Senate District. He has taken an oath to support and defend

the Constitution of the United States and the Constitution of North Carolina. As the leader of the North Carolina Senate, he represents the institutional interests of that body in this case. He appears in his official capacity.

9. Plaintiff Bobby Heath is a resident of Pitt County, North Carolina. He has been a registered voter in North Carolina since March 1980 and has voted in virtually every election since that time. Mr. Heath voted absentee by mail in the November 2020 general election under the rules requiring a single witness for his absentee ballot. Mr. Heath returned his absentee ballot by mail and according to the State Board of Elections' website that ballot was accepted on September 21, 2020.

10. Plaintiff Maxine Whitley is a resident of Nash County, North Carolina. She has been a registered voter in North Carolina since October 1964 and has voted in virtually every election since that time. Mrs. Whitley voted absentee by mail in the November 2020 general election under the rules requiring a single witness for her absentee ballot. Mrs. Whitley returned her ballot by mail and according to the State Board of Election's website that ballot was accepted on September 17, 2020.

11. Plaintiff Alan Swain is a resident of Wake County, North Carolina and is running as a Republican candidate to represent the State's 2nd Congressional District.

12. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections, which is the agency that is charged with administration of North Carolina's election laws and with the "general supervision over the primaries and elections in the State." N.C. GEN. STAT. § 163-22(a). He is named in his official capacity.

13. Defendant Stella Anderson is a member of the North Carolina State Board of Elections. She is named in her official capacity.

14. Defendant Jeff Carmon, III, is a member of the North Carolina State Board of Elections. He is named in her official capacity.

15. Defendant Karen Brinson Bell is the Executive Director of the North Carolina State Board of Elections. She is named in her official capacity.[1]

BACKGROUND

The General Assembly Established the Rules for the Election

16. Article I, Section 4, clause 1 of the U.S. Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. 1, § 4, cl. 1.

17. The Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id*. The Elections Clause thus does not grant the power to regulate elections to states, but only to the state's legislative branch.

18. Article II, Section 1 of the North Carolina State Constitution creates the North Carolina "Legislature" by vesting the "legislative power" exclusively in "the General Assembly, which shall consist of a Senate and a House of Representatives." *See also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). As the "the legislative branch," the General Assembly "enacts laws

[1] The North Carolina State Board of Elections is generally five members. Two members resigned on September 23, 2020, alleging they had not been properly advised of the consequences of the Board's policy changes as reflected in the Memoranda. *See 'Blindsided': GOP Elections Board Members Resign Over Absentee Ballot Settlement*, WSOCTV.COM (Sept. 24, 2020), https://www.wsoctv.com/news/local/2-gop-members-nc-state-board-elections-resign-report-says/O4OKQMNVWNEEBLQMKGZLGMNXOQ; *see also* David Black Resignation Letter (Sept. 23, 2020) (attached hereto as Ex. 6); Ken Raymond Resignation Letter (Sept. 23, 2020) (attached hereto as Ex. 7).

that protect or promote the health, morals, order, safety, and general welfare of society." *Id*. (internal quotation marks omitted).

19. As North Carolina's "Legislature," the General Assembly is tasked with regulating federal elections in North Carolina. U.S. CONST. art. 1, § 4, cl. 1. Accordingly, the General Assembly has exercised its federal constitutional authority to establish rules governing the manner of federal elections in North Carolina and many options for North Carolinians to exercise their right to vote.

20. Voters may cast their ballots in person at their assigned polling place on Election Day, which this year is November 3, 2020.

21. Voters who are "able to travel to the voting place, but because of age or physical disability and physical barriers encountered at the voting place [are] unable to enter the voting enclosure to vote in person without physical assistance . . . shall be allowed to vote either in [their] vehicle[s] . . . or in the immediate proximity of the voting place." N.C. GEN. STAT. § 163-166.9(a). This is commonly known as curbside voting.

22. Voters can vote early. North Carolina has established a 17-day early voting period beginning the third Thursday before the election through the last Saturday before the election at any early voting site in their county. N.C. GEN. STAT. §§ 163-227.2, 163-227.6. This means early voting starts this year on October 15, 2020. To ensure access, the same curbside voting accommodations are available at early voting sites. *See* Vote Early In-Person, N.C. STATE BD. OF ELECTIONS, https://bit.ly/3082mTf (last accessed Sept. 26, 2020).

23. Further, voters can vote by absentee ballot either early or on Election Day and without any special circumstance or reason necessary. See N.C. GEN. STAT. §§ 163-226, 163-230.2, 163-231.Voters can request an absentee ballot. But so too can the voter's near relative,

verifiable legal guardian, or member of a multipartisan team trained and authorized by the county board of elections on the voter's behalf. N.C. GEN. STAT. § 163-230.2.

24. To return a completed absentee ballot, a voter must have it witnessed and then mail or deliver the ballot in person, or have it delivered by commercial carrier. In addition, the voter's near relative or verifiable legal guardian can also return the ballots in person. N.C. GEN. STAT. § 163-231. But other than the voter's near relative or verifiable legal guardian, the General Assembly has criminally prohibited any other person from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5).

25. In general, absentee ballots must be returned to the local county board of elections by either (a) 5:00 p.m. on Election Day or (b) if postmarked by Election Day, the absentee ballots must be received "no later than three days after the election by 5:00 p.m." N.C. GEN STAT. § 163-231(b)(2)(b). This is the Receipt Deadline.

26. In short, the General Assembly has enacted numerous means for North Carolinians to vote and provided clear rules to regulate those means.

The General Assembly Revises Election Laws in the Bipartisan Elections Act of 2020

27. The General Assembly has also ensured that North Carolina's election laws have been updated to respond to the issues presented by the ongoing COVID-19 pandemic.

28. Governor Cooper declared a state of emergency on March 10, 2020 due to the COVID-19 pandemic. North Carolina elections officials soon understood that it may be appropriate to adjust the State's voting laws to account for the pandemic.

29. North Carolina State Board of Elections Executive Director Karen Brinson Bell submitted a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" on March 26, 2020.

30. In her letter, Director Bell requested that, among other things, the General Assembly "[r]educe or eliminate the witness requirement." Director Bell explained that such action was recommended to "prevent the spread of COVID-19." She further argued that "[e]liminating the witness requirement altogether is another option." N.C. State Board of Elections, *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3 (March 26, 2020), https://bit.ly/369EBOO (attached hereto as Ex. 4).

31. On June 11, 2020, the General Assembly passed bipartisan legislation adjusting the voting rules for the November Election by an overwhelming 142–26 margin. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Governor Cooper signed the duly passed bill into law the next day.

32. The Bipartisan Elections Act made a number of adjustments to North Carolina's election laws, including some of which Director Bell requested. The Act expands the pool of authorized poll workers to include county residents beyond a particular precinct, 2020 N.C. Sess. Laws 2020-17 § 1.(b); allows absentee ballots to be requested online, by fax, or by email, *id.* §§ 2.(a), 7.(a); directs the Board to develop guidelines for assisting registered voters in nursing homes and hospitals, *id.* § 2.(b); gives additional time for county boards to canvass absentee ballots, *id.* § 4; and provides over $27 million in funding for election administration, *id.* § 11.

33. In the Bipartisan Elections Act, the General Assembly also changed the Witness Requirement for absentee ballots. Normally under North Carolina law, absentee ballots require two qualified witnesses. *See* N.C. GEN. STAT. § 163-231.

34. But for the 2020 Election, the Bipartisan Elections Act provides that an "absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of *at least one person* who is at least 18 years of age and is not

disqualified by G.S. 163–226.3(a)(4) or G.S. 163–237(c).” *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added).

35. The one absentee ballot witness is still required to sign “the application and certificate as a witness” and print their “name and address” on the absentee ballot’s return envelope. *Id.*

36. The Bipartisan Elections Act did not accept Director Bell’s recommendation to “[e]liminat[e] the witness requirement altogether.” *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3.

37. The Bipartisan Elections Act also did not change the Receipt Deadline for absentee ballots, which remains set by statute as three days after the election by 5:00 p.m.

38. The Bipartisan Elections Act did not alter the prohibition on “any person” “tak[ing] into that person’s possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter.” N.C. GEN. STAT. § 163-226.3(a)(5). This remains clearly illegal as a matter of North Carolina law.

Director Bell and the Board Attempted to Assert Emergency Powers to Change the Election Laws

39. Director Bell has previously maintained that she is authorized to issue emergency orders to conduct an election where the normal schedule is disrupted “pursuant to [her] authority under G.S. § 163-27.1 and 08 NCAC 01.0106.” N.C. State Bd. of Elections, Numbered Memo 2020-14 at 1 (July 23, 2020), https://bit.ly/2EyXPlt. As relevant here, N.C. GEN. STAT. § 163-27.1 states that the Director “may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by” either “(1) [a] natural disaster” or “(2) [e]xtremely inclement weather.”

40. N.C. ADMIN. CODE 1.0106 explains that, for the purposes of § 163-27.1, a "natural disaster or extremely inclement weather include a . . . catastrophe arising from natural causes resulted [sic] in a disaster declaration by the President of the United States or the Governor."

41. Director Bell does not have sweeping authority to revise the North Carolina's elections statutes for the 2020 Election under the "natural disaster" provision.

42. The North Carolina Rules Review Commission unanimously rejected—by a vote of 9–0, see Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/308WSHW (attached hereto as Ex. 8)—the Board's proposed changes to N.C. Admin Code 1.0106 that would have clarified that

> "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident that makes it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting place or that creates a significant risk of physical harm to persons in the voting place, or that would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

Proposed Amendments to 08 N.C. ADMIN. CODE 01.0106 (Mar. 19, 2020), https://bit.ly/3082lyO.

43. In declining to approve the changes to the rule, the Rules Review Commission explained that the Board "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. Rules Review Commission Meeting Minutes at 4.

44. Accordingly, Director Bell and the Board do not have any delegated authority to rewrite North Carolina's election laws.

The Board Agreed with Private Litigants to Usurp North Carolina's Election Statutes

45. On August 10, 2020, nearly two months after the General Assembly's enactment of the Bipartisan Elections Act, the North Carolina Alliance for Retired Americans, a social welfare organization comprised of retirees from public and private unions, community organizations, and individual activists, together with seven individual North Carolina voters filed

suit in the Wake County Superior Court. *See North Carolina Alliance for Retired Americans, et al. v. North Carolina State Board of Elections* ("*Alliance*"), No. 20-CVS-8881 (Wake Cnty. Super. Ct.).

46. The *Alliance* plaintiffs named as a defendant one of the named Defendants in this action, Board Chair, Damon Circosta.

47. The *Alliance* plaintiffs sought injunctive relief, seeking numerous alterations to North Carolina's election statutes.

48. Among their requested relief, *Alliance* plaintiffs sought to "[s]uspend the Witness Requirement for single-person or single-adult households." Pls.' Compl. at 4, *Alliance*, No. 20-CVS-8881 (Wake Cnty. Super Ct. Aug. 10, 2020).

49. *Alliance* plaintiffs further requested an extension of the Receipt Deadline to "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day." *Id.*

50. *Alliance* plaintiffs also sought to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot. *Id.* at 39.

51. Legislative Plaintiffs Moore and Berger successfully intervened to defend the duly-enacted election regulations, as it is their absolute right to do under State law.

52. But before the state court had an opportunity to decide *Alliance* plaintiffs' motion for a preliminary injunction, the Board and the *Alliance* plaintiffs came to terms on a proposed consent judgment. Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment, *Alliance*, No. 20-CVS-8881 (Wake Cnty. Super. Ct. Sept. 22, 2020) (attached hereto as Ex. 1).

53. The Board released three Numbered Memoranda, at the same time as announcing the consent judgment.[2] Each Memorandum undoes validly enacted statutes passed by the General Assembly's exclusive prerogative to regulate federal elections. Each Memorandum is dated September 22, 2020.

54. Numbered Memo 2020-19 "directs the procedure county boards must use to address deficiencies in absentee ballots." Originally released August 21, 2020, the Board revised this Memo in a manner that eviscerates the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. N.C. State Bd. of Elections, Numbered Memo 2020-19 at 1 (August 21, 2020, revised Sept. 22, 2020), https://bit.ly/333yE3H (original version attached hereto as Ex. 3; revised version attached hereto as Ex. 1 at 32–37).

55. If a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the Board will allow the absentee voter to "cure" the deficiency. A voter cures a Witness Requirement deficiency through a "certification." *Id.* at 2.

56. The Board's "certification" is simply a form sent to the voter by the county board. And the voter can return the form to the county board at anytime until 5:00 p.m., November 12, 2020 and may do so via fax, email, in person, or by mail or commercial carrier. *Id.* at 3–4.

57. For a missing witness, the "certification" does not require the voter to resubmit a ballot in accordance with the Witness Requirement mandated by Section 1.(a) of the Bipartisan

[2] Numbered Memo 2020-19 is available on the Board's Numbered Memo page. *See* Numbered Memos, N.C. STATE BD. OF ELECTIONS, https://bit.ly/367Ffw8 (last accessed Sept. 26, 2020). But Numbered Memos 2020-22 and 2020-23 for some reason are not available. These Memoranda are dated September 22, 2020 and are publicly available through a link to the Board's joint motion in the Board's press release announcing the motion. *See* N.C. State Bd. of Elections, *State Board Updates Cure Process to Ensure More Lawful Votes Count* (Sept. 22, 2020) (attached hereto as Ex. 2) (linking to the Board's joint motion at https://bit.ly/2S5qBNr). Numbered Memo 2020-19 also cross references Numbered Memo 2020-22. *See* Numbered Memo 2020-19 at 4.

Elections Act. Instead, the "certification" lets the voter skip the Witness Requirement altogether. *Id.*

58. All a voter must do is sign and affirm the following affidavit:

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

59. Thus, the Board through Numbered Memo 2020-19's "certification" allows absentee voters to be their own witness and vitiates the Witness Requirement. This is directly contrary to clear text of the Bipartisan Elections Act. Notably, in federal litigation challenging the Witness Requirement, Director Bell testified under oath that an absentee ballot with "no witness signature" could not be cured and therefore elections officials would have to "spoil that particular ballot" and require the voter to vote a new one. Evidentiary Hearing Tr. at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. July 21, 2020) (attached hereto as Ex. 5).

60. Director Bell and the Board sought to "[e]liminate" the Witness Requirement earlier this year legislatively. The General Assembly affirmatively declined. Yet the Board has attempted to accomplish what it could not do legislatively via an administrative memo.

61. Numbered Memo 2020-19, together with Number Memo 2020-22, alters the Receipt Deadline in violation of a duly enacted provision of the North Carolina General Statutes. *See* N.C. GEN. STAT. § 163-231(b)(2)(b).

62. Numbered Memo 2020-19 states that a ballot is not late (1) if it is received by 5:00 p.m. on Election Day or (2) "if postmarked on or before Election Day" and "received by 5 p.m. on Thursday, November 12, 2020." Numbered Memo 2020-19 at 4.

63. Election Day is November 3, 2020. Under the Receipt Deadline enacted by the General Assembly, a ballot must be received by November 6 at 5:00 p.m.—in other words within three days of Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b).

64. The Board, through Numbered Memo 2020-19, completely ignores that strict statutory limit and extends the Receipt Deadline to *nine days*—tripling the amount of time for absentee ballots to arrive.

65. Numbered Memo 2020-22 confirms this change in the Receipt Deadline and the Memo on its face points out that it directly contradicts N.C. GEN. STAT. § 163-231(b)(2)(b). In Footnote 1, the Memo invites the North Carolinian voter to compare the Board's new Receipt Deadline of nine days with the now-made-defunct statutory deadline of "three days after the election." The Board has transparently usurped the authority of the General Assembly by overruling the statutory deadline.

66. Numbered Memo 2020-19 and Numbered Memo 2020-22 by overruling a clear statutory deadline have transgressed the General Assembly's sole prerogative to regulate federal elections pursuant to the Elections Clause.

67. Numbered Memo 2020-22 also expands the category of ballots eligible to be counted if received after election day. By statute, such ballots must be "postmarked" by the U.S. Postal Service on or before Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b). Under Numbered Memo 2020-22, however, such ballots may be accepted in certain circumstances if not

postmarked by the Postal Service or not sent by through the Postal Service at all but rather by commercial carrier. *See* Numbered Memo 2020-22 at 1–2 (attached hereto as Ex. 1 at 29–30).

68. Numbered Memo 2020-23 clarifies the procedures for local county officials to confirm that ballots are delivered lawfully. For instance, the Numbered Memo sets out that county officials must confirm with an individual that is dropping off ballots that the individual is either the voter, the voter's near relative, or the voter's legal guardian. But even if the individual is not in one of the three lawful categories of those that can drop off a voter's ballot, the Numbered Memo instructs that "Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot." This undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots. N.C. State Bd. of Elections, Numbered Memo 2020-23 at 2 (Sept. 22, 2020), https://bit.ly/333yE3H (attached hereto as Ex. 1 at 39–43).

69. Moreover, Numbered Memo 2020-23 does nothing to prevent the anonymous and unlawful delivery of votes. After stating that "an absentee ballot may not be left in an unmanned drop box," *i.e.*, a place where county officials are not confirming the identity of the mail deliverer at all, the memorandum plainly discloses the Board's lack of desire to enforce the ban on anonymous deliveries of ballots. To that end, local voting sites that have "a mail drop or drop box used for other purposes . . . must affix a sign stating that voters may not place their ballots in the drop box." "However, a county board may not disapprove a ballot solely because it is placed in a drop box." Thus, Numbered Memo 2020-23 plainly discloses that votes that are illegally placed in a drop box—with only a mere sign saying they should not be so placed—will be counted. This fundamentally undermines the General Assembly's criminal prohibition on the delivery of ballots

by those whom it has not authorized, as it provides a clear avenue for ballot harvesters to submit absentee ballots in drop boxes after hours that will nonetheless be counted. *Id.* at 1, 3.

70. Groups supporting Democratic candidates have brought numerous lawsuits challenging the restrictions on ballot harvesting, and thus will be more involved in delivering completed ballots under these Memoranda than groups supporting Republican candidates. *See* Amended Complaint, *N.C. Alliance for Retired Ams.* (Wake Cnty. Super. Ct. Aug. 17, 2020) (attached hereto as Ex. 9); Amended Complaint, *Stringer v. North Carolina*, No. 20-CVS-5615 (Wake Cnty. Super. Ct. July 8, 2020) (attached hereto as Ex. 10); Second Amended Complaint, *Democracy N.C.* (M.D.N.C. June 18, 2020) (attached hereto as Ex. 11); Second Declaration of Tomas Lopez ¶ 2(d), *Democracy N.C.*, ECF No. 73-1 (attached hereto as Ex. 12).

71. Numbered Memo 2020-19, as amended, Numbered Memo 2020-22, and Numbered Memo 2020-23 are each dated September 22, 2020. These modifications thus come well after North Carolina began mailing out absentee ballots on September 4, 2020. *See* Pam Fessler, *Voting Season Begins: North Carolina Mails Out First Ballots*, NPR.ORG (Sept. 4, 2020) https://bit.ly/2Gb2dY2; N.C. GEN. STAT. § 163-227.10. Director Bell has acknowledged that absentee ballots are sent out on a "rolling" basis. As of September 22, 2020 at 4:40 a.m. (several hours before the three Memoranda were announced), 153,664 absentee ballots had *already been cast*. Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 22, 2020), *available at* https://bit.ly/33SKzAw. Each and every one of those ballots cast with a different set of rules than those which now apply post-September 22, 2020 with the three Memoranda.

72. Two of the ballots that had already been cast when the September 22, 2020 Memoranda issued were of Plaintiffs Heath and Whitley. Both Plaintiff Heath and Plaintiff Whitley requested their absentee ballots, voted their absentee ballots, and returned their absentee

ballots to their respective County Board of Elections under the statutory rules that existed before Defendants altered those rules on September 22, 2020. This means that both Plaintiffs Heath and Whitley, following the statutory requirement and the instructions on their absentee ballots, obtained a witness over the age of 18 who was not otherwise disqualified to witness their ballot and that they returned that ballot by mail before election day. According to the State Board of Election's website Plaintiff Heath's ballot was validly returned on September 21, 2020 and Plaintiff Whitley's ballot was validly returned on September 17, 2020.

The Board's Memoranda Injure the Plaintiffs

73. Implementation of the Board's unconstitutional Memoranda is causing a direct, concrete, and particularized injury to the Legislative Plaintiffs' interest in the validity of the duly-enacted laws of North Carolina and the Legislative Plaintiffs' constitutional prerogative to regulate the federal elections in North Carolina.

74. The arbitrary issuance of unconstitutional memoranda in the middle of ongoing voting by thousands of North Carolina's is a direct, concrete, and particularized injury to Plaintiffs Heath and Whitley who cast their absentee ballots prior to the release of the Memoranda. Since these Memoranda have arbitrarily changed the requirements for lawful casting of ballots, these Memoranda deprive Plaintiffs Heath and Whitley of the Equal Protection Clause's guarantee of the "nonarbitrary treatment of voters." *Bush*, 531 U.S. at 105–06. And since the Memoranda instruct county boards to accept ballots that would be otherwise unlawful under North Carolina's election statutes, each unlawfully cast vote "dilutes" the weight of Plaintiffs Heath's and Whitley's vote. When it comes to "'dilut[ing] the influence of honest votes in an election,'" whether the dilution is "'in greater or less degree is immaterial;'" it is a violation of the Fourteenth

Amendment. *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962).

75. Implementation of the Board's unconstitutional Memoranda are also causing a direct, concrete, and particularized injury to Plaintiff Swain. The Memoranda instruct county boards to accept ballots that would otherwise be unlawful under North Carolina's election statutes, and North Carolina Democrats are requesting and submitting absentee ballots at a higher rate than North Carolina Republicans, thereby injuring Plaintiff Swain by causing his election race to be administered in an unlawful and arbitrary manner. Additionally, groups supporting Democratic candidates will be more involved in filing ballots under these Memoranda (as these groups requested the changes) than groups supporting Republican candidates, further causing the election race to be administered in an unlawful and arbitrary manner.

CLAIM FOR RELIEF

COUNT I

Violation of the Elections Clause (U.S. CONST. art. I, § 4, cl. 1); 42 U.S.C. § 1983

76. The facts alleged in the foregoing paragraphs are incorporated by reference.

77. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. 1, § 4, cl. 1 (emphasis added).

78. The Elections Clause requires that state law concerning federal elections be "prescribed in each State by the Legislature thereof." That mandate operates as a limitation on how states may regulate federal elections. *See Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from denial of certiorari). Whatever the scope of the state courts' authority in other contexts, under the United States

Constitution they may not "prescribe[]" "[r]egulations" governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."

79. The Board is *not* the Legislature of North Carolina. The General Assembly is. N.C. CONST. art. II, § 1.

80. The Board promulgated three Memoranda that are inconsistent with the General Assembly's duly-enacted elections laws.

81. Numbered Memo 2020-19 allows for absentee ballots without a witness in direct contravention of the General Assembly's duly-enacted Witness Requirement.

82. Numbered Memo 2020-19 and Numbered Memo 2020-22 establish a nine-day deadline for the receipt of absentee ballots in direct contravention of the General Assembly's duly-enacted three-day Receipt Deadline. Numbered Memo 2020-22 also expands the class of ballots that can be accepted if received after Election Day.

83. Numbered Memo 2020-23 undermines the General Assembly's criminal prohibition on the delivery of absentee voters by approving the counting of unlawfully delivered ballots.

84. All three Memoranda thus usurp the General Assembly's sole authority to prescribe the regulations governing federal elections in North Carolina.

85. The Board has and will continue to act under color of state law to violate the Elections Clause.

86. Plaintiffs have no adequate remedy at law, and the Memoranda will continue to inflict serious and irreparable harm to the constitutional right to regulate federal elections in North Carolina unless the Board is enjoined from enforcing them.

COUNT II

Violation of the Equal Protection Clause (U.S. CONST. amend. XIV, § 1); 42 U.S.C. § 1983

87. The facts alleged in the foregoing paragraphs are incorporated by reference.

88. The Equal Protection Clause of the Fourteenth Amendment provides that state laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

89. As relevant here, the Equal Protection Clause protects voters' rights in two ways. First, the Equal Protection Clause ensures that voters may "participate in" elections "on an equal basis with other citizens." *Dunn*, 405 U.S. at 336. To that end, "a State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05 (internal citation and quotation marks omitted).

90. The Board issued the three Memoranda after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly. This "later arbitrary and disparate treatment" of absentee ballots deprives Plaintiffs Heath and Whitley of the Equal Protection Clause's guarantee because it allows for "varying standards to determine what [i]s a legal vote." *Id.* at 104–105, 107.

91. Second, the Equal Protection Clause ensures voters' rights to have their ballots counted "at full value without dilution or discount." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). After all, "[o]bviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballot and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted," in turn, means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

92. Both direct denials and practices that otherwise allow for the counting of unlawful ballots dilute the effectiveness of individual votes, thus, can violate the Fourteenth Amendment. *See id.* at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

93. The Board's Memoranda ensures the counting of votes that are *invalid* under the duly enacted laws of the General Assembly in three ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Numbered Memo 2020-19; (2) by allowing absentee ballots to be received up to nine days after Election Day, *see id.*; *see also* Numbered Memo 2020-22; and (3) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see* Numbered Memo 2020-23.

94. In addition to allowing illegally cast ballots to count, the practices enabled and allowed by the Memoranda are also open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the vote of Plaintiffs Heath and Whitley.

95. The Board has and will continue to act under color of state law to violate the Equal Protection Clause and its guarantees.

96. Plaintiffs Heath and Whitley have no adequate remedy at law and will suffer serious and irreparable harm to their Constitutional right to equal protection of the laws and to participate in federal elections in North Carolina on an equal basis unless the Board is enjoined from enforcing these Memoranda.

PRAYER FOR RELIEF

Plaintiffs respectfully request that:

(a) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-19 is unconstitutional under the Elections Clause and invalid;

(b) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-22 is unconstitutional the Elections Clause and invalid;

(c) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-23 is unconstitutional the Elections Clause and invalid;

(d) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that by issuing Numbered Memo 2020-19, Numbered Memo 2020-22, and Numbered Memo 2020-23, the Board violated the Equal Protection Clause rights of Plaintiffs Heath and Whitley.

(e) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-19 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(f) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-22 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(g) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-23 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(h) The Court award Plaintiffs their reasonable costs and attorneys' fees under 42 U.S.C. § 1988; and

(i) The Court grant Plaintiffs such other and further relief as may be just and equitable.

Dated: September 26, 2020

Respectfully submitted,

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

Civil Action No. 4:20-CV-182

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN, Plaintiffs, v. DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections, Defendants.	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER**

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiffs respectfully request that this Court enter a temporary restraining order to enjoin an unprecedented effort by the State Board of Elections to usurp the General Assembly's prerogative to regulate federal elections in North Carolina. Disregarding the clear mandate of the U.S. Constitution that provides that only the "Legislature[s]" of the several states or Congress may prescribe the time, place, and manner of federal elections, the Board, through its Executive

Director Karen Brinson Bell, issued three Memoranda directly contravening the General Assembly's duly-enacted statutes. Ignoring the fact that the Board is neither the North Carolina Legislature nor Congress, the Board proceeded to negotiate with private parties and issue these Memoranda to gut several important election rules. Further, these ad-hoc Memoranda have been issued while voting is *ongoing* and to that end the Board is applying different rules to ballots cast by similarly situated voters thus violating the Equal Protection Clause in two distinct ways: this new regime results in arbitrary distinctions based solely on whether a ballot was cast before or after the Memoranda were adopted; and the new rules allow illegally cast votes to be counted thereby diluting the vote of those who cast their ballots lawfully. For the reasons set forth below and in light of the ongoing election, Plaintiffs are entitled to a temporary restraining order.

STATEMENT OF FACTS

As North Carolina's "Legislature," the General Assembly is tasked with regulating federal elections in North Carolina. U.S. CONST. art. 1, § 4, cl. 1. Accordingly, the General Assembly has exercised its federal constitutional authority to establish rules governing the manner of federal elections in North Carolina and provided many options for North Carolinians to exercise their right to vote. For instance, voters have three main options for casting their ballots. Voters may vote in person on Election Day, they may vote in person during the 17-day early voting, or they may vote absentee by mail.

Voters do not need any special circumstance or reason to vote absentee in North Carolina. To return completed absentee ballots, a voter must have them witnessed and then must mail or deliver them through a delivery service such as UPS or in person. In addition, the voter's near relative or verifiable legal guardian can also return the ballots in person. N.C. GEN. STAT. § 163-231. But other than the voter's near relative or verifiable legal guardian, the General Assembly has

criminally prohibited any other person from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5).

The General Assembly also enacted strict requirements for the return of absentee ballots. Generally speaking, absentee ballots must be received by the appropriate local county board of elections either: (a) no later than 5:00pm on Election Day; or (b) if postmarked by Election Day, "no later than three days after the election by 5:00 p.m." N.C. GEN STAT. § 163.231(b)(2)(b). This is referred to as the Receipt Deadline.

In response to the COVID-19 pandemic, North Carolina elections officials sought the power to adjust the State's voting laws to account for the pandemic. To that end, North Carolina State Board of Elections Executive Director Karen Brinson Bell and the Board attempted to assert emergency powers to change the election laws for the 2020 election pursuant to statutory authority to respond to a "natural disaster." N.C. GEN. STAT. § 163-27.1. But the North Carolina Rules Review Commission unanimously rejected this attempted power grab—by a vote of 9–0, *see* Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/3kLAY5y (Compl. Ex. 8). In declining to approve the changes to the rule, the Rules Review Commission explained that the Board "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. *Id.*

Director Bell also wrote a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" on March 26, 2020. N.C. State Board of Elections, *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3 (March 26, 2020), https://bit.ly/369EBOO (Compl. Ex. 4). In her letter, Director Bell requested that, among other things, the General Assembly "[r]educe or eliminate the witness requirement." She explained

that such action was recommended to "prevent the spread of COVID-19." And she further argued that "[e]liminating the witness requirement altogether is another option."

On June 11, 2020, the General Assembly passed bipartisan legislation adjusting the voting rules for the November Election by an overwhelming 142-26 margin. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Governor Cooper signed the duly passed bill into law the next day. The Act made a number of adjustments to North Carolina's election laws, including some—but not all—of what Director Bell requested.

Unlike Director Bell's suggestion to "[e]liminate" the Witness Requirement, the General Assembly modified the requirement. Normally under North Carolina law, absentee ballots require two qualified witnesses. *See* N.C. GEN. STAT. § 163-231. But for the 2020 Election, the Bipartisan Elections Act provides that an "absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of *at least one person* who is at least 18 years of age and is not disqualified by G.S. 163–226.3(a)(4) or G.S. 163–237(c)." *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added). The one absentee ballot witness is still required to sign "the application and certificate as a witness" and print his or her "name and address" on the absentee ballot's return envelope.

And while the Bipartisan Elections Act changed numerous other provisions to account for the pandemic, it did not change the Receipt Deadline for absentee ballots, which remains set by statute as three days after the election by 5:00pm for ballots delivered by the U.S. Postal Service. The Bipartisan Elections Act also did not alter the prohibition on "any person" other than a near relative or verifiable legal guardian "tak[ing] into that person's possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5). This remains clearly illegal as a matter of North Carolina law.

On August 10, 2020, nearly two months after the General Assembly's enactment of the Bipartisan Elections Act, the North Carolina Alliance for Retired Americans, a social welfare organization comprised of retirees from public and private unions, community organizations, and individual activists, together with seven individual North Carolina voters filed suit in the Wake County Superior Court. *See North Carolina Alliance for Retired Americans, et al. v. North Carolina State Board of Elections* ("*Alliance*"), No. 20-CVS-8881 (Wake Cnty. Super. Ct.).

The *Alliance* plaintiffs named as a defendant one of the named Defendants in this action, Board Chair, Damon Circosta. The *Alliance* plaintiffs sought injunctive relief, seeking numerous alterations to North Carolina's election statutes. Among their requested remedies, the *Alliance* plaintiffs asked the court to "[s]uspend the Witness Requirement for single-person or single-adult households" and to "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day." The *Alliance* plaintiffs also sought to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot.

Legislative Plaintiffs Moore and Berger intervened as of right to defend the duly-enacted election regulations. In fact, both the federal district court for the Middle District of North Carolina and a North Carolina state court heard and rejected recent motions to preliminarily enjoin the Witness Requirement because the plaintiffs in those cases failed to show a likelihood of success on the merits. *See* Order on Injunctive Relief, *Chambers v. State*, No. 20 CVS 500124, at 6–7 (N.C. Super. Ct. Sept. 3, 2020); *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).

But before the state court had an opportunity to rule on the motion for a preliminary injunction in the *Alliance* case, the Board and the *Alliance* plaintiffs agreed to a proposed consent

judgment. Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment, *Alliance*, No. 20-CVS-8881 (Sept. 22, 2020 Wake Cnty. Super. Ct.) (Compl. Ex. 1). The Board made this agreement despite the fact that "a lot of the concessions" in the consent judgment had been previously rejected by the federal and state court hearing similar claims. *See* Ken Raymond Resignation Letter (Sept. 23, 2020) (Compl. Ex. 7); *see also* David Black Resignation Letter (Sept. 23, 2020) (Compl. Ex. 6). Lawyers in the North Carolina Attorney General's office allegedly did not apprise Board members of this fact, prompting two Board members to resign. *See id.*

The Board released three Numbered Memoranda, at the same time as announcing the consent judgment.[1] Each memorandum purports to nullify validly enacted statutes passed by the General Assembly pursuant to its exclusive federal constitutional prerogative to regulate the time, place, and manner for holding federal elections. Numbered Memo 2020-19 "directs the procedure county boards must use to address deficiencies in absentee ballots." Originally released August 21, 2020, the Board revised it on September 22, 2020 to allow voters to cure deficiencies in the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. (Compl. Ex. 1 at 32–37; original attached as Compl. Ex. 3). If a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the Board will allow the absentee voter to "cure" the deficiency. A voter cures a Witness Requirement deficiency through a "certification."

The Board's "certification" is simply a form sent to the voter by the county board. And the voter can return the form to the county board at any time until 5 p.m., November 12, 2020, and

[1] Numbered Memo 2020-19 is available on the Board's Numbered Memo page. *See* https://bit.ly/367Ffw8 (last accessed Sept. 26, 2020). But Numbered Memos 2020-22 and 2020-23 for some reason are not available. These Memoranda are dated September 22, 2020 and are publicly available through a link to the Board's joint motion in the Board's press release announcing the motion. *See* https://bit.ly/2S5qBNr; *see also* N.C. State Bd. of Elections, State Board Updates Cure Process to Ensure More Lawful Votes Count (Sept. 22, 2020) (Compl. Ex. 2). Numbered Memo 2020-19 also cross references Numbered Memo 2020-22. *See* Numbered Memo 2020-19 at 4.

may do so via fax, email, in person, or by mail or commercial carrier. For a missing witness, the "certification" does not require the voter to resubmit a ballot in accordance with the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. Instead, the "certification" eliminates the Witness Requirement altogether. All a voter must do is sign and affirm the following affidavit:

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

Thus, the Board through Memorandum 2020-19's "certification" allows absentee voters to be their own witnesses, a step that effectively vitiates the Witness Requirement. This is directly contrary to clear text of the Bipartisan Elections Act that requires at least one witness for every absentee ballot. 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. at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. July 21, 2020) (Compl. Ex. 5). This understanding is also reflected in the original version of Numbered Memo 2020-19, which required ballots with missing witness information to be spoiled because such "deficiencies cannot be cured by affidavit, because the missing information comes from someone other than the voter." Original Numbered Memo 2020-19 at 2.

Numbered Memo 2020-19, together with Numbered Memo 2020-22, alters the Receipt Deadline in violation of a duly enacted provision of the North Carolina General Statutes. *See* N.C.

GEN. STAT. § 163-231(b)(2)(b). Numbered Memo 2020-19, cross-referencing Numbered Memo 2020-22, states that a ballot is not late (1) if it is received by 5 p.m. on Election Day or (2) "if postmarked on or before Election Day" and "received by 5 p.m. on Thursday, November 12, 2020." Election Day is November 3, 2020. Under the Receipt Deadline enacted by the General Assembly, a ballot must be received by November 6 at 5:00pm—in other words, within three days of Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b). The Board, through Numbered Memos 2020-19 and 2020-22, completely ignores that strict statutory limit and extends the Receipt Deadline to *nine days*—tripling the amount of time for absentee ballots to arrive after Election Day. Numbered Memo 2020-22 also expands the category of ballots that may be counted if received after Election Day. (Compl. Ex. 1 at 29–30). Under state law, only ballots sent through U.S. Postal Service and "postmarked" by Election Day may be counted if received after Election Day. Numbered Memo 2020-22, however, in certain circumstances allows ballots sent through the U.S. Postal Service without a postmark or sent by commercial carrier to be counted if received after Election Day. *See* Numbered Memo 2020-22 at 1–2.

Numbered Memo 2020-23 undermines the General Assembly's criminal prohibition on the delivery of an absentee ballot by individuals other than the voter himself or the voter's near relative or legal guardian. (Compl. Ex. 1 at 39–43). The General Assembly has provided that it shall be unlawful for any person—other than the voter, the voter's near relative, or legal guardian—"to take into that person's possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5). And Numbered Memo 2020-23 purports to clarify the procedures for local county officials to confirm that ballots are delivered lawfully. For instance, the Numbered Memo sets out that county officials must confirm with individuals that are dropping off ballots that the individual is the voter, the voter's near relative,

or the voter's legal guardian. But even if the individual does not fall into one of the three lawful categories of people who can drop off a voter's ballot, the Numbered Memo instructs that "[i]ntake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot." This directly undermines the General Assembly's criminal prohibition on the unlawful delivery of ballots. *See* N.C. GEN. STAT. § 163-226.3.

Moreover, Numbered Memo 2020-23 does nothing to prevent the anonymous and unlawful delivery of votes. After stating that "an absentee ballot may not be left in an unmanned drop box," *i.e.*, a place where county officials are not confirming the identity of the mail deliverer at all, the memorandum plainly discloses the Board's lack of desire to enforce the ban on anonymous deliveries of ballots. To that end, local voting sites that have "a mail drop or drop box used for other purposes . . . must affix a sign stating that voters may not place their ballots in the drop box." "However, a county board may not disapprove a ballot solely because it is placed in a drop box." Thus, Numbered Memo 2020-23 plainly discloses that votes that are illegally placed in a drop box—with only a mere sign saying they should not be so placed—will be counted. This fundamentally undermines the General Assembly's criminal prohibition on the delivery of ballots by those whom it has not authorized.

Numbered Memo 2020-19, Numbered Memo 2020-22, and Numbered Memo 2020-23 are all dated September 22, 2020. These modifications thus come well after North Carolina began mailing out absentee ballots on September 4, 2020. *See* Pam Fessler, "Voting Season Begins: North Carolina Mails Out First Ballots," npr.org (Sept. 4, 2020), https://bit.ly/2Gb2dY2. As of September 22, 2020 at 4:40am (several hours before the three Memoranda were announced), 153,664 absentee ballots had *already been cast*. Absentee Data, North Carolina State Board of

Elections (Sept. 22, 2020), *available at* https://bit.ly/2G3stnJ. Each and every one of those ballots were cast with a different set of rules than those which now apply post-September 22, 2020 with the three Memoranda.

In response to the Board's actions, the Plaintiffs seek declaratory and injunctive relief.

STANDARD OF REVIEW

"The substantive standard for granting either a temporary restraining order or a preliminary injunction is the same." *Patel v. Moron*, 897 F. Supp. 2d 389, 395 (E.D.N.C. 2012). To obtain either, a party must establish: "(1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest." *Id.*; FED. R. CIV. P. 65(b).

ARGUMENT

Legislative Plaintiffs sue in their official capacity as Speaker of the House and President Pro Tempore of the Senate. As such, under North Carolina law, they represent *both* the institutional interests of the General Assembly *and* the interests of the State as a whole in this litigation. *See* N.C. GEN. STAT. §§ 1-72.2, 120-32.6. The Defendants' actions undermine North Carolina's election statutes and effectively nullify 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). Plaintiff Alan Swain is currently running as the Republican candidate for Congress in North Carolina's Second Congressional District. The Defendants' Memoranda unconstitutionally change the rules governing the ongoing voting in his federal election.

Plaintiffs Bobby Heath and Maxine Whitley are both eligible, registered voters who reside in North Carolina. Both Plaintiff Heath and Plaintiff Whitley, following the existing statutory requirements, requested and received absentee ballots. Both Plaintiff Heath and Plaintiff Whitley,

following the requirements in place before Defendants issued the Numbered Memos being challenged here, obtained a qualified witness and had that individual witness them voting their absentee ballot. Both Plaintiff Heath and Plaintiff Whitley, after obtaining the required witness signature on their ballots, returned their ballots by mail to their respective County Boards of Election and had those ballots received by their County Board of Election prior to September 22, 2020.

I. Plaintiffs Are Likely To Succeed on the Merits

The Defendants' actions in publishing the three Memoranda violate two provisions of the Constitution that protect our elections and the right to vote: the Elections Clause and the Equal Protection Clause.

A. The Defendants' Memoranda Violate 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." (emphasis added). U.S. CONST. art. 1, § 4, cl. 1. Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Since neither Congress nor the General Assembly promulgated the Board's Memoranda, these Memoranda are unconstitutional to the extent they overrule the enactments of the General Assembly or otherwise qualify as "Regulations" for 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." N.C. CONST. 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.*, Federalist No. 27, at 174–175 (C. Rossiter ed. 1961) (Alexander Hamilton) (defining "the State legislatures" as "select bodies of men"); "Legislature," American Dictionary of the English Language (1828) (Noah Webster) ("[T]he body of men in a state or kingdom, invested with power to make and repeal laws."); "Legislature," A Dictionary of the English Language (1755) (Samuel Johnson) ("The 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. State Legislature v. Ariz. Indep. Redist. Comm'n*, 576 U.S. 787, 814 (2015), 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. Redist. 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." M. Farrand, *The Records of the Federal Convention of 1787, vol. 2* (1911), *available at* https://bit.ly/3kPvZRu.

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." *Id*. 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 from them or modified by their state constitutions." *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); *Com. 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 Board has clearly violated the Elections Clause by issuing Memoranda that purport to adjust the rules of the election that have already been set by statute. First, the Board has no freestanding power under the Constitution to rewrite North Carolina's elections laws and to "prescribe[ ]" the Board's own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. The exclusive home of the legislative branch in North Carolina is the General Assembly. Thus, the Board is not the "Legislature" empowered to adjust the rules of the federal election on its own.

Second, the Board has not been delegated the General Assembly's constitutional authority, so 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. Redist. Comm'n*, 576 U.S. at 795. But here the Board has no legislative power and is not on equal footing with the General Assembly. Indeed, the North Carolina Supreme Court expressly held that a prior version of the Board "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 Board. The current version of the statute does not change the nature of the Board's activities but

rather addresses the constitutional infirmities recognized by *Cooper v. Berger*. *Compare id.* at 114, with N.C. GEN. STAT. § 163-19.

Furthermore, the Board is merely a creature of statute. *See* N.C. GEN STAT. § 163-19(a) ("There is established the State Board of Elections, which may be referred to as the "State Board" in this Chapter."). And consistent with being a creature of statute, the Board 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* N.C. GEN. STAT. § 163-22(a) (emphasis added). Thus, the General Assembly has not granted the Board any power to overrule the duly enacted statutes governing elections or given it any form of legislative power. Quite the contrary, the Board is not allowed to issue any rules or regulations that "conflict" with provisions enacted by the General Assembly.

The Board's own actions confirm this. In particular, Executive Director Bell asked the General Assembly to eliminate the Witness Requirement. If the Board had the power to abolish that requirement unilaterally, why would the Board seek a legislative fix instead? The Board further sought to expand its emergency powers through regulation, but this effort too was rejected. If the Board had the power to overrule the General Assembly's statutes through its existing authorities, then why did it seek to amend its regulations in this way? The answer to both questions is the same—the Board does not have the power to amend or nullify the General Assembly's statutes regulating the federal election.

The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. And the General Assembly has not further delegated the power to enable the Board to amend or nullify its duly-enacted statutes. Thus, because the Numbered

Memoranda purport 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, these Memoranda violate the Elections Clause.

B. The Defendants' Ad-hoc Memoranda Violate 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 differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *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.

Defendants have violated these constitutional requirements, thereby infringing upon Plaintiff Heath's and Plaintiff Whitley's rights under the Equal Protection Clause to (1) "participate in" the upcoming election "on an equal basis with other citizens in" North Carolina. *Dunn*, 405 U.S. at 336, and (2) have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29.

First, if the Memoranda are not enjoined, 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* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a). North Carolina also 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). North Carolina also requires absentee ballots to be received, at the latest, by 5 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 Memoranda were announced like Plaintiffs Heath and Whitley. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the Board's memoranda. The Board's new Numbered Memo 2020-19 is thus a sudden about-face on the Witness Requirement that upends the careful bipartisan framework that has governed voting so far.

The Defendants' Memoranda not only effectively nullified the Witness Requirement and Ballot Harvesting Ban, *see supra* I.A., but the Board has also been plainly inconsistent in its requirements. On August 21, 2020, the Board 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 at 2 (Aug. 21, 2020). 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.*

The Defendants then arbitrarily changed course. The Defendants issued the updated Numbered Memo 2020-19 on September 22, 2020. 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 Board's Numbered Memo requires is that the voter merely 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." Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment Ex. B, *N.C. Alliance for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Super. Ct. Sept. 22, 2020) (Compl. Ex. 1 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.

And Numbered Memo 2020-19, in conjunction with Numbered Memo 2020-22, goes further by allowing absentee ballots to be received up to *nine days* after Election Day. This is both in violation of the General Assembly's enacted statutes but also a further change in the rules while voting is ongoing. And Numbered Memo 2020-23 further provides a standardless approach by allowing even the anonymous delivery of ballots—plainly contrary to 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.

Accordingly, if these Memoranda are not enjoined, 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 issuance of the Memoranda, and therefore worked to comply with the Witness Requirement 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 federal court and a North Carolina state 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, *Chambers v. State*, No. 20 CVS 500124, at 6–7 (N.C. Super. Ct. Sept. 3, 2020); *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). For the Board to suddenly reverse course 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. [2]

[2] Even if the state court *had* preliminarily enjoined the witness requirement, finding a likelihood of success on the merits, the fact would remain that the state court lacks authority to alter the election laws. *See supra* Part I.A. The Elections Clause of the U.S. Constitution assigns the role of regulating federal elections in North Carolina exclusively to the General Assembly, not the state courts. *See* U.S. CONST. art. I, § 4, cl. 1.

Second, if the Memoranda are not enjoined, the Board will be violating Plaintiffs Heath's and Whitley's rights to have their ballots counted without dilution. *Reynolds*, 377 U.S. at 555 n. 29. The Board's Memoranda ensure that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in three ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Numbered Memo 2020-19; (2) by allowing absentee ballots to be received up to nine days after Election Day, *see id.*; *see also* Numbered Memo 2020-22; and (3) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see* Numbered Memo 2020-23. These changes are open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the vote of Plaintiffs Heath and Whitley.

The Board's Memoranda are 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*, 417 U.S. at 226–27; *Baker v. Carr*, 369 U.S. 186, 208 (1962). Moreover, those practices, such as the Board'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 Board 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 Board has accepted votes that dilute the weight of lawful voters like Plaintiffs Heath and Whitley.

Accordingly, the Board is not only administering the election in an arbitrary and nonuniform manner that will inhibit Plaintiffs Heath's and Whitley's right "to participate in" the

election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336, but it is also purposefully allowing otherwise unlawful votes to be counted, thereby deliberately diluting and debasing Plaintiffs Heath's and Whitley's lawful votes. These are clear violations of Plaintiffs Heath's and Whitley's Equal Protection rights under the Fourteenth Amendment.

II. The Irreparable Harm to Plaintiffs Warrants a Temporary Restraining Order

Plaintiffs have demonstrated that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Board's *ongoing* implementation of the Memoranda has the immediate and irreparable effect of nullifying North Carolina election statutes during the very election those statutes were enacted to regulate. And the *ongoing* implementation undermines Plaintiffs Heath's and Whitley's right to vote on an equal basis right now as individuals are casting votes under the updated Memoranda now.

First, the ongoing nullification of duly-enacted North Carolina laws governing this election is *per se* irreparable. "The inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The Board's actions are a serious affront to those "statutes enacted by representatives of its people," and thus can only be remedied by immediate injunctive relief. *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *see also Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020).

Second, Plaintiffs Heath's and Whitley's right to the Equal Protection of their right to vote cannot be remedied by damages and therefore constitutes irreparable harm. *See NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 526 (M.D.N.C. 2012) (citing *A Helping Hand, LLC v. Baltimore Cnty.*, 355 Fed. App'x 773, 776–77 (4th Cir. 2009));

see also Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction."). Their harm is all the more irreparable as voting is ongoing, thus the Board's arbitrary and standardless treatment of ballots—to the detriment of lawful voters like Plaintiffs Heath and Whitley—only gets worse and harder to remedy as more ballots are accepted under the new Memoranda.

III. The Public Interest and Lack of Harm to Defendants Warrant a Temporary Restraining Order

The balance of equities and public interest weigh strongly in favor of granting a temporary restraining order. Plaintiffs stand to suffer immediate, irreparable harm, including injuries to the General Assembly's prerogative to regulate the federal election, Plaintiff Swain's ongoing election, and Plaintiffs Heath's and Whitley's right to have their vote treated equally. And "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Moreover, the Board's decision to issue the Memoranda, changing the rules of balloting midstream, undermines public confidence in this election. And to the extent the Memoranda are unconstitutional, voters are being told inaccurate information right now about how to lawfully cast a ballot in North Carolina. Thus, these Memoranda introduce additional confusion and uncertainty into an election where citizens are already concerned about election security. Since "public confidence in the integrity of the electoral process has independent significance," the public interest would be further served here. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). By contrast, the Board can "in no way [be] harmed by issuance of a" temporary restraining order "which prevents the [Board] from enforcing [Memoranda] likely to be found unconstitutional. If anything, the system is improved by such" an order. *Giovani Carandola*, 303 F.3d at 521.

IV. The Court Should Waive the Bond Requirement or Set Bond at a Nominal Amount

While Federal Rule of Civil Procedure 65 provides that "[t]he court may issue a . . . temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined," it is well established "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement," *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). Here, Defendants will not suffer costs and damages from the proposed restraining order, so Plaintiffs should not be required to post security, or should be required to post only a nominal amount.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a temporary restraining order:

(1) Enjoining Defendants from enforcing and distributing Numbered Memo 2020-19 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(2) Enjoining Defendants from enforcing and distributing Numbered Memo 2020-22 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(3) Enjoining Defendants from enforcing and distributing Numbered Memo 2020-23 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause

(4) Enjoining Defendants from enforcing and distributing the three Numbered Memoranda or any similar memoranda or policy statement that does not comply with the requirements of the Equal Protection Clause.

Plaintiffs request that the temporary restraining order last until such time as the parties shall brief, and the Court shall decide, a motion for a preliminary injunction.

Dated: September 26, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.2(f)(3), the undersigned counsel hereby certifies that the foregoing Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order, including body, headings, and footnotes, contains 7265 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2020, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing, and served on counsel registered to receive CM/ECF notifications in this case. I also caused the foregoing document to be e-mailed to the following counsel for Defendants:

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statutory witness requirement for such a voter.[4]

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

SO ORDERED. This 3 day of October 2020.

JAMES C. DEVER III
United States District Judge

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, *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.)

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PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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No. TENTH DISTRICT

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.	)

****

PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

****

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 petition this Court to issue a temporary stay and a writ of supersedeas. 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 voting has already started, a paltry 10 days before in-person early voting begins, and a mere 29 days from election day. The consent judgment will do this in contravention of the North Carolina Constitution, the North Carolina General Statutes, and the federal

Constitution. The Superior Court entered this extraordinary, damaging, and unlawful consent judgment despite the fundamental defects and independently dispositive shortcomings that render the consent judgment likely to be reversed on appeal.

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 vitiating the witness requirement, extending the absentee ballot receipt deadline, amending the postmark requirement for ballots 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, 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). The temporary restraining order does not obviate the need for relief from this Court (it is set to expire October 16 and the NCSBE and Plaintiffs, who have sought to intervene in the case, presumably will fight against extending it or converting it to a preliminary injunction), but the federal court's ruling underscores the unlawful nature of the NCSBE's actions.

For these and the additional reasons explained below, this Court is likely to vacate the consent judgment. 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 so dramatically 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.

Together with their opposition to Plaintiffs' and the NCSBE's joint motion for entry of the consent judgment, Legislative Defendants requested that the Superior Court, in the alternative, stay the enforcement of that judgment. That requested relief, however, was implicitly denied when the court entered the consent judgment on October 2, 2020. Legislative Defendants now petition this Court 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. 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. In granting the motion, the court determined that Legislative Defendants were not necessary parties to the consent judgment, that the consent judgment was not "illegal, a product of collusion, or against the public interest," *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991), and that it was "fair, adequate, and reasonable," *North Carolina*, 180 F.3d at 581. The court also declined to grant

Legislative Defendants' request that the court stay enforcement of the consent judgment pending appeal to this Court by entering the judgment. Legislative Defendants now petition this Court for a writ of supersedeas and temporary stay pending appeal.

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 County*, 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." *Colorado*, 937 F.2d at 509. 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' naked 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)—have disappeared in the consent judgment. Plaintiffs and the NCSBE instead have relieved *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 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 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 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. 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.* 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 the federal court in *Moore* held was likely the case, Order at 11–16, *Moore*, the consent judgment violates 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, 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 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 have resulted 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

[2] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw.

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 consent judgment was announced. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the consent judgment.[3] The 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 consent judgment effectively nullifies the witness requirement and undermines the ballot harvesting ban, the NCSBE has also been plainly inconsistent in what each provision 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, Original Numbered Memo 2020-19 at 2 (Aug. 21, 2020) (attached as Doc. Ex. 98). 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. at 122, *Democracy N.C.*

[3] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw.

v. N.C. State Bd. of Elections, No. 20-cv-457 ("*Democracy N.C.* Tr.") (M.D.N.C. July 21, 2020) (attached as Doc. Ex. 106).[4]

The NCSBE then arbitrarily changed course and issued an updated Numbered Memo 2020-19 on September 22, 2020 as part of the 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, Revised Numbered Memo 2020-19 at 2–4 (Sept. 22, 2020) (explaining that deficiencies curable by a certification from the voter include a witness or assistant failing to write their name, address, or signature) (attached as Doc. Ex. 245). This absentee "certification" will transform an entirely unwitnessed (and hence invalid) ballot into a lawful, compliant ballot. All the NCSBE's consent judgment requires is that the voter merely 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." Consent Judgment at 34. In addition to failing to require an actual witness signature on the absentee ballot, 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 NCSBE represented to the Eastern District of North Carolina that Numbered Memo 2020-19 was updated "in order to comply with Judge Osteen's

[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 Doc. Ex. 252) 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.

preliminary injunction in the *Democracy N.C.* action in the Middle District," *see* Order at 9, *Moore*, which 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. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 U.S. Dist. LEXIS 138492, at *177 (M.D.N.C. Aug. 4, 2020). The same day, the NCSBE represented to the *Democracy North Carolina* court that the updated memo was merely "consistent with"—not required to comply with—"the Order entered by [the] Court on August 4, 2020." Notice of Filing at 1, ECF No. 143, *Democracy N.C.*, No. 20-cv-457 (M.D.N.C. Sept. 28, 2020). But the *Democracy North Carolina* court, which had rejected an attempt to enjoin the witness requirement, emphatically disagreed with even this relaxed interpretation of its order: "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, ECF No. 145, *Democracy N.C.*, No. 20-cv-457, (M.D.N.C. Sept. 30, 2020) (citation omitted).

The consent judgment goes further by allowing 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 but also a further 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 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 Inj. Relief at 6–7, *Chambers v. State*, No. 20 CVS 500124 (N.C. Super. Ct. Sept. 3, 2020) (attached as Doc. Ex. 270); *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 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. The 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* Consent Judgment at 29–34; (2) by allowing absentee ballots to be counted if received up to nine days after election day, *see id.* at 26–27; (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 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 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, 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. 3d 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 three of the Plaintiffs—Tom Kociemba, Rosalyn Kociemba, and Rebecca Johnson—***have already voted***.[5] They certainly have not

[5] *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*

established that these 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 (attached as Doc. Ex. 281) (Sept. 4, 2020), 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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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).

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 or vote in the next several weeks will have their ballots returned on time. 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 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. 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 four weeks 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 4, 2020, over 1.1 million absentee ballots have been requested and over 356,000 voters have already cast their absentee ballots.[6] Moreover, counties have already set their

[6] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 1, 2020).

one-stop early voting schedules.[7] 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 schedules have already been set and disseminated—will 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.

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 v. Iredell County*, 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 omitted)). Here, Plaintiffs did not file their initial

[7] *See Vote Early In-Person*, N.C. STATE BD. OF ELECTIONS (Sept. 21, 2020), https://bit.ly/2Geq3ms.

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 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 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*, 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 v. Newsome*, 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 (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*, 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). 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), 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).

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. Hicks*, 333 N.C. 467, 484, 428 S.E. 3d 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).[8]

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

[8] 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.

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 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, 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. 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, 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). 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 Plaintiff Johnson has 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. 4, 2020); *Judicial Voter Guide 2020* at 14, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2EPP72k (last accessed Oct. 4, 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 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).[9] The Massachusetts Supreme Judicial Court held that this

[9] *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).

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 instead to vote and return her ballot the day she gets it. *See id.* at 15:18–20.

November 3, 2020," as evidenced by a November 3 postmark. 2020 MASS. ACTS ch. 115, sec. 6(h)(3).

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.[10]

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 and fraud than other methods of voting." Affidavit of Kimberly Westbrook Strach ¶¶ 54–55 (attached as Doc. Ex. 696). Accordingly, the witness requirement was

[10] *FAQs: Voting by Mail in North Carolina in 2020*, N.C. STATE BD. OF ELECTIONS (Sept. 1, 2020), https://bit.ly/30vgciI.

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.*—over 1.1 million absentee ballots have been requested as of October 1, 2020, compared with merely 125,784 requests 33 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."[11] 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.[12] 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.

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[11] 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.

[12] Nsikan Akpan, *What Fauci Says the U.S. Really Needs To Reopen Safely*, NAT'L GEOGRAPHIC (Aug. 13, 2020), https:/on.natgeo.com/2EQZxhM.

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).

The North Carolina Supreme 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 (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 vitiates 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 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) (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 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, 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 1,157,606 absentee ballots and cast 356,297 absentee ballots.[13] 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 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

[13] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 1, 2020).

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, the consent undermines confidence in the election by eliminating safeguards that protect against ineligible and fraudulent voting and that protect vulnerable voters. *See* Strach Aff. ¶¶ 69, 72, 87. 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 the election, particularly when the NCSBE also has barred signature matching for absentee ballots. Indeed, eliminating the witness requirement will create particularly acute risks for 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 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, (and if NCSBE and Plaintiffs are successful in federal court), 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 this Court 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 5th 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 5th 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 5th day of October, 2020, served a copy of the foregoing Petition and Motion by electronic mail and by first class mail, on the following parties at the following addresses:

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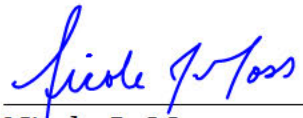

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No._____ TENTH DISTRICT

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).

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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.

[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 By: 

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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

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

TIMOTHY K. MOORE, et al., Plaintiffs, v. DAMON CIRCOSTA, et al., Defendants.	)	1:20CV911
PATSY J. WISE, et al., Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., Defendants.	)	1:20CV912

ORDER

The North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, move to intervene as Defendants in case number 1:20CV911 under Federal Rule of Civil Procedure 24. (Doc. 27.) Those same parties also move to intervene in a related case, case number 1:20CV912. (Doc. 21.) Plaintiffs responded in the 1:20CV911 case, (Doc. 61), and this

matter is now ripe for ruling. The court will grant proposed intervenors' (hereinafter referred to as "Alliance Intervenors") motion for permissive intervention under Federal Rule of Civil Procedure 24(b).

Rule 24 provides two avenues for intervention: intervention as of right pursuant to Rule 24(a)(2), and permissive intervention pursuant to Rule 24(b). Fed R. Civ. P. 24(a)(2) and (b). If intervention as of right is not warranted, a court may still allow an applicant to intervene permissively under Rule 24(b). Id.

Under Rule 24(b), the court may permit anyone who "has a claim or defense that shares with the main action a common question of law or fact" to intervene on timely motion. Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Where a movant seeks permissive intervention as a defendant, the movant must therefore satisfy three requirements: (1) the motion is timely; (2) the defenses or counterclaims have a question of law or fact in common with the main action; and (3) intervention will not result in undue delay or prejudice to the existing parties. See League of Women Voters of Va. v. Va. State Bd. of Elections, Case No. 6:20-CV-

00024, 2020 WL 2090679, at *3 (W.D. Va. Apr. 30, 2020); Carcano v. McCrory, 315 F.R.D. 176, 178 (M.D.N.C. 2016).

The Fourth Circuit has held that "liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986) (internal quotation marks omitted); see also Friend v. REMAC Am., Inc., No. 3:12-CV-17, 2014 WL 2440438, at *1 (N.D. W. Va. May 30, 2014) (analyzing motion to intervene "in the context of the Fourth Circuit's policy favoring 'liberal intervention' and preventing the 'problem of absent interested parties'" (quoting Feller, 802 F.2d at 729)). Further, the decision to grant or deny permissive intervention "lies within the sound discretion of the trial court." Smith v. Pennington, 352 F.3d 884, 892 (4th Cir. 2003) (quoting Hill v. W. Elec. Co., 672 F.2d 381, 386 (4th Cir. 1982)).

The court finds that Alliance Intervenors meet the standards for permissive intervention. First, the court finds that the Alliance Intervenors' motion was timely. Alliance Intervenors filed their motion to intervene between four and six days after Plaintiffs filed their Complaints and motions for temporary restraining order in each of these cases, (see 1:20CV911 (Docs. 1, 8, 27); 1:20CV912 (Docs. 1, 3, 21)), and

before the original Defendants submitted any substantive responses to the Complaints and motions. See Carcano, 315 F.R.D. at 178 (finding the intervenors' motion timely when it was filed nine days after the plaintiffs filed their motion for preliminary injunction and before the defendants had filed any documents). The first element is thus satisfied in each of these cases.

Second, it is undisputed that Proposed Intervenors' interests, as reflected in their proposed answer and the joint motion for entry of a consent judgment, (1:20CV911 (Doc. 27-1) at 2), share common questions of law and fact with the main action in this case; that is, the legality of North Carolina's election laws as amended by a consent order in which Alliance Intervenors were Plaintiffs seeking the relief granted by that Consent Order. (see id.) See N.C. State Conference of NAACP v. Cooper, 332 F.R.D. 161, 172 (2019) (agreeing that the proposed intervenors' proposed answer included "defenses which present common issues of fact and law"). Here, like the named defendants, Alliance Intervenors seek to assert defenses to Plaintiffs' claims for relief. (See generally 1:20CV911 (Doc. 27-2); 1:20CV912 (Doc. 21-1).)

Finally, the court finds that allowing Alliance Intervenors to intervene will not result in undue delay or prejudice to the

parties. The court will require Proposed Intervenors adhere to the briefing schedule set out by this court in a status conference held on October 5, 2020. (See Minute Entry 10/05/2020.) Further, Alliance Intervenors' issues and arguments largely overlap with the legal and factual issues that are already present in this action, therefore the addition of Alliance Intervenors is not likely to significantly complicate the proceedings or unduly expand the scope of discovery should discovery be necessary.

Because the court is satisfied that permissive intervention is warranted here, the court declines to conduct an analysis under Rule 24(a)(2), although it does appear Alliance Intervenors have a substantial interest in this litigation. Alliance Intervenors are parties to, and beneficiaries of, the Consent Judgment. Their interests as reflected in the consent judgment could be directly impaired as a result of this action.

IT IS THEREFORE ORDERED that Alliance Intervenors' Motions to Intervene as Defendants, (1:20CV911 (Doc. 27); 1:20CV912 (Doc. 21)), are **GRANTED**.

IT IS FURTHER ORDERED that Proposed Intervenors shall adhere to the briefing schedule as directed by the court on October 5, 2020. (Minute Entry 10/05/2020.)

This the 8th day of October, 2020.

William L. Osteen, Jr.
United States District Judge

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

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

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

ORDER

Before the court is Plaintiffs' motion to stay pending review in the United States Court of Appeals for the Fourth Circuit. (1:20CV911 (Doc. 75); 1:20CV912 (Doc. 57).) The applicable standards for an injunction or stay pending appeal are similar. See, e.g., Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017); Nken v. Holder, 556 U.S. 418, 434 (2009).

After careful consideration of the relevant factors, this court finds a stay of this court's order in part, and to allow the previously entered Temporary Restraining Order to remain in effect until October 16, 2020, at 11:59 p.m., is appropriate. This court held a telephone conference with the parties on October 15, 2020, at 5:00 p.m., and neither Defendants nor the Alliance Intervenors object to this short stay pending a motion for emergency relief in the Fourth Circuit.

In view of the foregoing,

IT IS ORDERED that this court's order, (1:20CV911 (Doc. 74); 1:20CV912 (Doc. 56), is hereby **STAYED** until Friday, October 16, 2020, at 11:59 p.m.

IT IS FURTHER ORDERED that the Temporary Restraining Order, (1:20CV911 (Doc. 47); 1:20CV912 (Doc. 25), shall remain in full force and effect until Friday, October 16, 2020, at 11:59 p.m.

This the 15th day of October, 2020.

William L. Osteen, Jr.
United States District Judge

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

PATSY J. WISE, REGIS CLIFFORD, CAMILLE ANNETTE BAMBINI, SAMUEL GRAYSON BAUM, DONALD J. TRUMP FOR PRESIDENT INC., U.S. CONGRESSMAN DANIEL BISHOP, U.S. CONGRESSMAN GREGORY F. MURPHY, REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, and NORTH CAROLINA REPUBLICAN PARTY, *Plaintiffs, vs.* THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS, *Defendants.*	Civil Action No. 20-cv-00912

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs Patsy J. Wise, Regis Clifford, Camille Annette Bambini, Samuel Grayson Baum, Donald J. Trump for President Inc., U.S. Congressman Daniel Bishop, U.S. Congressman Gregory F. Murphy, Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and the North Carolina Republican Party, appeal to the United States Court of Appeals for the Fourth Circuit from the Court's October 14, 2020 Memorandum and Order, Dkt. No. 56.

Respectfully submitted,

Dated: October 15, 2020

By: */s/ Bobby R. Burchfield*

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2020, I electronically filed the foregoing document using the court's CM/ECF system and that I have electronically mailed the documents to all non-CM/ECF participants.

/s/ *Bobby R. Burchfield*
Bobby R. Burchfield

No. 20-2104

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATSY J. WISE, *et al.*,

Plaintiff-Appellants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the State Board of Elections, *et al.*,

Defendants-Appellees,

and

BARKER FOWLER, et al.

Intervenors/Defendants

On Appeal From the United States District Court for the Middle District of North Carolina
Case No. 1:20-cv-00912-WO-JLW

EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND APPELLANTS' BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Patsy J. Wise, Regis Clifford, Camille Annette, Samuel Grayson Baum, U.S. Congressman Daniel Bishop, U.S. Congressman Gregory F. Murphy, Donald J. Trump for President, Inc., Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and North Carolina Republican Party hereby notify the Court that they have no parent corporation and that no publicly held corporation owns any of their stock. No other publicly held corporation has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), the Defendants do not consent and intend to respond to the motion.

INTRODUCTION

Plaintiffs request an injunction pending appeal in order to prevent the North Carolina State Board of Elections ("BOE") from implementing sweeping changes to North Carolina's election code only weeks before Election Day. An injunction pending appeal will preserve the status quo and protect Plaintiffs' federal constitutional rights while the parties can brief the merits of the district court's underlying order, which raises substantial questions regarding the proper application of *Purcell v. Gonzalez,* 549 U.S. 1, 127 S. Ct. 5 (2006), and whether the BOE's proposed changes violate the Equal Protection Clause.

In June 2020, the North Carolina General Assembly modified the state's voting laws to address potential effects of COVID-19. Several lawsuits were filed challenging the revised laws, including the absentee voting provisions at issue in this litigation. For three months, the BOE vigorously defended those suits, and before absentee voting began a federal judge and a three-judge state court panel upheld the challenged provisions. *See* IA007, *Chambers v. North Carolina,* Case No. 20-CVS-500124, Order at *7 (Sup. Ct. Wake Cnty. Sept. 3, 2020) (Lock, J., Bell, J., Hinton, J.) (denying preliminary injunction against absentee ballot

witness requirement a day before absentee voting began); IA011, *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 comprehensive 188-page decision, refusing to enjoin witness requirement, ballot harvesting requirement, and other provisions, but granting limited relief). Both courts agreed with the BOE that changing the laws so close to the election—on September 3 or even August 4, respectively—would harm voters and administrators. *Chambers*, No. 20-CVS-500124, IA007; *Democracy N.C.*, 2020 WL 4484063, at *45. The United States Supreme Court recently echoed this concern. *See Andino v. Middleton*, No. 20A55, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 2020) (staying Sept. 18 injunction of South Carolina's absentee ballot witness requirement).

But nearly a ***month after absentee voting had been underway***, the BOE secretly negotiated a proposed "Consent Judgment" with the plaintiffs in a separate case—*North Carolina Alliance for Retired Americans v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (Sup. Ct. Wake Cnty.). Three BOE "Numbered Memos" incorporated into the Consent Judgment would ***substantially*** alter the absentee voting laws—including the Witness Requirement and the Ballot Harvesting

ban—and effectively reverse the decisions in *Chambers* and *Democracy North Carolina*.

On September 28, following the BOE's announcement, Plaintiffs-Appellants ("Plaintiffs") filed a complaint and motion for a temporary restraining order ("TRO") in the United States District Court for the Eastern District of North Carolina. On October 3, within hours of a North Carolina Superior Court's approval of the Consent Judgment on October 2, the district court granted the TRO against implementation of the Numbered Memos "to preserve the status quo." Dkt. No. 25 at 15 (IA213). The court then transferred the case to Judge William Osteen in the Middle District of North Carolina, who is also handling the *Democracy North Carolina* case.

On October 14, 2020, Judge Osteen issued an order on Plaintiffs' motion for a preliminary injunction. *Wise v. N.C. State Board of Elections*, No. 20-cv-912, Order (M.D.N.C. Oct. 14, 2020) (IA219). Judge Osteen rejected numerous abstention theories, and ruled that Plaintiffs had standing, that portions of the Numbered Memos likely violated Plaintiffs' rights to equal protection, and that Plaintiffs would likely suffer irreparable harm. Nevertheless, the court denied the injunction based

on the Supreme Court's decision in *Purcell v. Gonzalez,* 549 U.S. 1, 127 S. Ct. 5 (2006).[1]

The district court misread *Purcell*. *Purcell*'s primary concern was preserving the status quo and preventing last minute *changes* to a state's election statutes. Here, the Numbered Memos—which if implemented would make wholesale changes to North Carolina's election statutes — are not in effect because of the TRO. Thus, far from precluding an injunction, the *Purcell* doctrine *compels* one here in order to maintain both the status quo and the integrity of the General Assembly's duly-enacted election regime. Plaintiffs seek an emergency injunction pending expedited review by this Court to assure that the Memos do not become effective before this Court has the opportunity to review the denial of the preliminary injunction. An injunction pending appeal will assure the

[1] On October 15, ruling on Plaintiffs' Motion for Injunction Pending Appeal, *see* Fed. R. App. P. 8(a)(1), Judge Osteen clarified that the TRO will remain in place until 11:59 p.m. on October 16. IA310. Shortly thereafter, the North Carolina Court of Appeals stayed the order approving the Consent Judgment pending review of the Superior Court's decision. IA523. With the TRO expiring on October 16, and the Court of Appeals' stay of uncertain duration, Plaintiffs are filing this motion to assure this Court has sufficient time to consider the requested relief before the challenged Memos become effective. *See* Fed. R. App. P. 8(a)(2)(A) & 4th Cir. L. R. 8.

status quo remains intact, and protect Plaintiffs' constitutional rights while the parties brief and this Court considers the merits of this appeal.

BACKGROUND

A. The Consent Judgment and Numbered Memos

In June 2020, after careful consideration of the pandemic, the recent primaries conducted in other states (such as Wisconsin), and challenges confronted by the U.S. Postal Service during those primaries, the North Carolina General Assembly passed HB 1169 by overwhelming bipartisan majorities. Governor Cooper signed the bill and it became law. At least seven lawsuits challenging the statute have been filed. For three months the BOE vigorously defended the legislation, prevailing in all material respects in two cases, one in federal court and one before a three-judge panel in state court.[2] Both courts based denial of relief in part on the imminence of the election.

On September 22, however—after absentee voting began on September 4—the BOE abruptly announced a secretly-negotiated proposed "Consent Judgment" with the plaintiffs in the *Alliance* action.

[2] *See Democracy N.C.*, 2020 WL 4484063, at *64; *Chambers*, No. 20 CVS 500124, Order.

If implemented, the deal would implement sweeping changes to North Carolina's election laws through a series of "Numbered Memos" issued by the BOE. That deal was to become effective upon court approval. *See* IA331, Consent Judgment at 19.

As relevant here, the BOE's Numbered Memos issued in conjunction with the Consent Judgment purport to do the following:

- Revised Numbered Memo 2020-19 would undermine the statutory requirement that another person witness an absentee ballot (the "Witness Requirement") by allowing a voter to cure the omission of a witness certification through the submission of a cure affidavit *executed by the voter*, but without fulfilling the Witness Requirement. *See* IA352; *see also* N.C.G.S. § 163-231(a).

- Numbered Memo 2020-22 requires a ballot to be counted if "the ballot is postmarked on or before Election Day [the "Postmark Requirement"] and received by ***nine days*** after the election, which is Thursday, November 12, 2020 at 5:00 p.m." *See* IA356. In contrast, the statute requires ballots to

be received by ***three days*** after the election, November 6. N.C.G.S. § 163-231(b)(2)(b) (the "Receipt Deadline").[3]

On October 2, Judge G. Bryan Collins of the Wake County Superior Court held a hearing and approved the Consent Judgment to which the contested Memos are appended. In the course of his consideration, the BOE repeatedly represented to the Court that the new Memos were consistent with, or even required by, the ruling in *Democracy North Carolina*.[4] After reviewing the briefs and decision in *Alliance,* Judge Osteen wrote that both seriously mischaracterized his ruling in *Democracy North Carolina*. *See Democracy N.C.*, 2020 WL 6058048, at *7 ("The [BOE's] mischaracterization of this court's injunction in order to obtain contradictory relief in another court frustrates and circumvents

[3] Memo 2020-22 also undermines the statutory requirement that mailed ballots bear a postmark on or before election day, and Memo 2020-23 severely weakens protections against ballot harvesting. IA358.

[4] *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 6058048, at *3 (M.D.N.C. Oct. 14, 2020) (stating that the BOE "cited this court's August Order" from *Democracy North Carolina* in "arguing that the North Carolina Superior Court should approve and enter the Consent Judgment"). For example, the BOE asserted that the "cure procedure introduced in the Revised Memo 2020-19 as part of the consent judgment would comply with [the] injunction." *Id.*

this court's August Order.").[5] On October 5, Judge Collins issued, without revision, findings of fact and conclusions of law submitted by the BOE. Judge Collins' order did not address the rulings in *Chambers* or *Democracy North Carolina* (issued approximately one month and two months before his order) that it is too late to change state election laws.

B. The Federal Actions

Because these Numbered Memos flout North Carolina's election statutes, contradict the decisions in *Chambers* and *Democracy North Carolina*, and are causing disruption among county election boards, Plaintiffs filed a Complaint and Motion for TRO against the Memos in the United States District Court for the Eastern District of North Carolina on September 26—*before* Judge Collins acted on the proposed Consent Judgment in the *Alliance* action—to preserve North Carolina's election regime and prevent the BOE from violating Plaintiffs' federal constitutional rights. *See* Compl., *Wise* IA525; Mtn. for Temporary Restraining Order, IA582; *see also Moore v. Circosta*, No. 20-cv-507-D, Compl., IA559 (E.D.N.C. Sept. 26, 2020) (raising similar challenges).

[5] *See also Democracy N.C.*, 2020 WL 6058048, at *9 (referring to the BOE's "gross mischaracterization of the relief granted").

On October 2—immediately following the hearing before Judge Collins regarding the Consent Judgment—United States District Judge James C. Dever III held a hearing on the Motion for TRO. The next morning, Judge Dever granted the TRO, thereby restraining, through October 16, the defendants in *Wise* and *Moore* from enforcing the Memos "or any similar memoranda or policy statement that does not comply with the requirement of the Equal Protection Clause." IA217 (the "TRO Order"). By the time of the TRO Order, 1,157,606[6] absentee ballots had been requested and 340,795[7] had been returned. The TRO Order was "intended to maintain the status quo"—*i.e.*, the situation before the Memos go into effect—and in fact the challenged Memos have not yet become effective. On October 4, the BOE issued another Numbered Memo placing the challenged Memos on hold based on the TRO. *See* IA363, Numbered Memo 2020-28 (placing on hold Numbered Memos 2020-19,

[6] *See* https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Ballot%20Requests%20for%202020%20General%20Election/Daily_Absentee_Request_Report_2020Oct02.pdf

[7] *See* https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/Absentee_Stats_2020General_10032020.pdf

2020-22, 2020-23, and 2020-27). The October 4 Memo instructed county boards to "take no action" with respect to deficient absentee-ballot return envelopes. *Id.*

Judge Dever transferred both cases (*Wise* and *Moore*) to Judge Osteen (M.D.N.C.), who is also handling the *Democracy North Carolina* case, for further proceedings. *Id*. Plaintiffs in the *Wise* and *Moore* cases moved for preliminary injunctions, and Judge Osteen heard those motions on October 8.

On October 14, Judge Osteen issued a 91-page order on Plaintiffs' motion for a preliminary injunction. *See* IA219. In that order, the district court properly rejected Defendants' arguments relating to standing[8] and

[8] Judge Osteen properly determined that Wise, one of the individual Plaintiff voters, has standing to make an Equal Protection Clause challenge because she cast an absentee ballot before the BOE arbitrarily changed the absentee voting rules. She has alleged the concrete and particularized injury of being arbitrarily subject to a different set of procedures than prospective voters who would vote in compliance with the challenged Memos. *See* IA258, IA263-64. The Republican Committee and candidate Plaintiffs have also sustained injury because the arbitrary and disparate procedures undermine their investments in educating voters about the statutory procedures. *See 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). In addition, Plaintiffs have standing to bring their Equal Protection claim because the valid votes they cast in compliance with the state statutes will be diluted if votes cast under the challenged Memos, which abrogate those statutes, are counted. *See*

abstention.[9] It then held that Plaintiffs had "established a likelihood of success on their Equal Protection challenges with respect to the [BOE's] procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots." *Id.* at IA221. It continued that "[t]his court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined." *Id.* at

James v. Bartlett, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005) ("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 the unlawful votes determines an election's outcome.").

[9] Judge Osteen carefully evaluated and rejected the four abstention theories floated by Defendants. Plaintiffs need add only three points to his thoughtful analysis. First, *Pullman* abstention requires that the dispute involve a "sensitive area of social policy upon which the federal courts ought not to enter," whereas federal courts commonly hear disputes about state election laws. *See Moore v. Sims*, 442 U.S. 415, 428 (1979). Second, Plaintiffs are challenging the legality of the Board's Numbered Memos, and the Court has determined that *Younger* does not "require abstention in deference to a state judicial proceeding reviewing legislative or executive action." *New Orleans Pub. Serv. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989). Third, additional factors weigh against *Colorado River* abstention, including the fact that Plaintiffs' claims rest entirely on federal law and that the state proceedings are not progressing at an adequate speed so as to vindicate the Plaintiffs' rights before the general election. *See Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463–64 (4th Cir. 2005).

IA308.[10] Based on its reading of *Purcell*, however, the district court denied the injunction, "*even in the face of what appear to be clear violations*" of Plaintiffs' constitutional rights. *Id.* The district court later clarified that the TRO will remain in effect until 11:59 p.m. on October 16. IA310.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STANDARD OF REVIEW

Th Court ordinarily "review[s] the decision to grant or deny a preliminary injunction for an abuse of discretion," *Roe v. Dep't of Def.*, 947 F.3d 207, 219 (4th Cir. 2020) (quotations omitted), and "review[s the] District Court's legal rulings *de novo*," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *see also Hunter*

[10] Because Judge Osteen simultaneously issued an order in *Democracy North Carolina* enjoining the portions of the revised Numbered Memo 2020-19 which purported to eliminate the Witness Requirement, *see* IA365, he held that Plaintiffs' request to preserve the Witness Requirement was moot, but that the Receipt Deadline extension was ripe for review. IA287.

v. Earthgrains Co. Bakery, 281 F.3d 144, 150 (4th Cir. 2002) ("[A]n error of law by a district court is by definition an abuse of discretion.").

ARGUMENT

Motions for an emergency injunction pending appeal are governed by the same four-factor test that governs applications for a preliminary injunction in the district court. *See Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001) ("In ruling on . . . a request [for a preliminary injunction pending appeal], this court makes the same inquiry as it would when reviewing a district court's grant or denial of a preliminary injunction.").[11] As a result, a party "must show (1) that he will likely prevail on the merits of the appeal, (2) that he will suffer irreparable injury if the stay is denied, (3) that other parties will not be substantially harmed by the stay, and (4) that the public interest will be served by granting the stay." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014).

[11] *See also Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013) ("We evaluate a motion for an injunction pending appeal using the same factors and . . . approach that govern an application for a preliminary injunction.").

I. A PRELIMINARY INJUNCTION PENDING APPEAL IS NECESSARY TO PROTECT PLAINTIFFS' CONSTITUTIONAL RIGHTS AND ENSURE PROPER CONSIDERATION OF THE MERITS.

Plaintiffs satisfy each of the factors for preliminary relief, as explained below. But without a preliminary injunction pending appeal and expedited briefing, Plaintiffs' ability to argue the merits of their case will be substantially curtailed, if not eliminated. The timeline of this litigation shows why.

The TRO will expire on October 16 at midnight, less than three weeks before Election Day, and the North Carolina Court of Appeals' stay is of uncertain duration. If the BOE is allowed to implement the challenged Memos, including its extension of the Receipt Deadline, the result would be, as Judge Osteen found, a violation of Plaintiffs' equal protection rights. Once the Board implements the challenged Memos, this Court may fear that an order enjoining the Board is too close to the election and would do more harm than good. Only a preliminary injunction pending disposition of the merits can assure that this Court's decision-making process, and Plaintiffs' constitutional rights, are not prejudiced by a material change in the status quo. An injunction, and a prompt decision by this Court, would protect all interests.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE *PURCELL* DOCTRINE ENCOURAGES COURTS TO MAINTAIN STATE ELECTION LAWS IN THE WEEKS BEFORE AN ELECTION.

The district court declined to issue injunctive relief based solely on its reading of *Purcell,* in which the Supreme Court warned against altering state election laws in the weeks before an election. The appeal of the district court's order therefore depends on the resolution of one question: does the *Purcell* doctrine bar entry of a preliminary injunction in the circumstances of this case?[12]

The answer is clearly no. As demonstrated below, *Purcell* merely prevents courts from *changing* the status quo by invalidating state voting statutes shortly before an election. An injunction in this case, however, would *preserve* the status quo and the state statutes. Accordingly,

[12] This issue relates to the first and fourth factors of the four-factor test governing motions for an injunction pending appeal. Plaintiffs satisfy the second and third tests because, as Judge Osteen explained, the Receipt Deadline Extension violates their rights to equal protection. Moreover, with less than three weeks before the election, a change in the Receipt Deadline threatens imminent irreparable harm. In contrast, no voter would be prejudiced by maintaining the status quo because every voter is able to submit a timely ballot far enough in advance to account for any delays.

Plaintiffs are likely to succeed on the merits because the district court abused its discretion by denying the motion for preliminary injunction based solely on an incorrect interpretation of *Purcell*.

A. ***Purcell*'s Purpose Is To Maintain State Election Laws Immediately Prior to an Election.**

The district court ruled that enjoining the Receipt Deadline would amount to the kind of improper interference with election rules that *Purcell* cautions against. IA285-87 (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ____, ____, 140 S. Ct. 1205, 1207 (2020)). Far from prohibiting injunctive relief in this instance, however, *Purcell* and recent caselaw applying that decision ***confirm*** that such relief is appropriate here to ***prevent*** significant alterations to North Carolina's election code while voting is underway: over 1,300,000 absentee ballots have been requested and more than half a million already cast.[13] Further, the status quo is that the challenged Numbered Memos are not in effect, which means that, in this case, a preliminary injunction would also continue the status quo.

[13] *See* https://www.ncsbe.gov/ for the latest numbers.

In *Purcell*, the plaintiffs challenged 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 promptly reversed, requiring respect for the state statute, and emphasizing that "[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 recently applied this principle in election litigation to enforce Wisconsin's requirement that absentee ballots be postmarked by election day after a federal district court unilaterally altered that requirement by allowing ballots to be counted if they were *received* by the receipt deadline (a week after election day). *See Republican Nat'l Comm.*, 140 S. Ct. at 1205–07 (staying preliminary injunction issued by federal district court and emphasizing that the injunction "contravened" the rule that courts "should ordinarily not alter the election rules on the eve of an election").

The Supreme Court recently applied the *Purcell* doctrine to require respect for South Carolina's absentee ballot witness requirement. In *Middleton v. Andino*, No. 3:20-CV-01730-JMC, 2020 WL 5591590, at *38 (D.S.C. Sept. 18, 2020), the district court enjoined South Carolina's witness requirement. The state appealed, and an en banc panel of this Court allowed the injunction to remain in effect. No. 20-2022, 2020 WL 5752607, at *1 (4th Cir. Sept. 25, 2020). But the state appealed to the Supreme Court, which reversed the en banc decision and stayed the district court's injunction pending disposition of the appeal in the Fourth Circuit and disposition of a writ of certiorari, again protecting the state statute. *Andino v. Middleton*, No. 20A55, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 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, emphasis added). As in *Purcell* and the *Republican National Committee* case in Wisconsin, the Supreme Court's order in *Andino* required a return to the statutory requirement.

Several recent court of appeals decisions support the view that *Purcell* is aimed at maintaining state election statutes as Election Day draws closer. *See, e.g.*, *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) (relying on *Purcell* to affirm district court's order denying an injunction that would force Indiana to permit unlimited mail-in voting); *Ariz. Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020) (granting state's emergency motion for stay of district court's order enjoining absentee ballot signature deadline); *New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *1 (11th Cir. Oct. 2, 2020) (staying district court's injunction because lower court "manufactured its own ballot deadline so that the State [was] required to count any ballot that was both postmarked by and received within three days of Election Day").

The *Andino* decision and these court of appeals decisions illustrate that the *Purcell* doctrine is aimed at ***preventing*** changes to state election laws close to an election. The district court read *Purcell* to preclude injunctions by federal district courts near an election. But this neglects what *Purcell* and many of the decisions following it actually did. In order to protect the state statutes, some actually changed the status quo by

staying lower court injunctions against state statutes prior to the election. Some maintained the status quo by affirming denials of injunctions against state statutes. Here, an injunction would not only maintain the status quo; it would also vindicate the state election code. At the very least, the issue of whether the district court properly interpreted and applied *Purcell* deserves consideration on the merits given how often *Purcell* has been cited since the COVID-19 pandemic launched a wave of election-law related litigation.[14] Granting a preliminary injunction pending appeal would maintain the status quo—and the state statutory scheme—while the parties brief this issue.

B. *Purcell* Compels an Injunction in This Case.

Far from precluding an injunction, the *Purcell* doctrine actually *compels* an injunction in order to protect the statutory scheme and preserve the status quo. An injunction here would protect the General Assembly's duly-enacted statutory scheme governing the election and maintain the status quo in which those statute are, by virtue of the TRO, currently in effect.

[14] Plaintiffs' research indicates that courts have cited *Purcell* in the election-law context approximately 92 times since March 1 and 49 times since September 1.

In contrast, allowing the Board's Numbered Memos to go into effect would violate *Purcell* and *Andino* by (1) effectively rewriting the bipartisan laws passed by the General Assembly to address voting during COVID-19 and (2) overruling the three-judge panel's decision in *Chambers v. North Carolina,* Case No. 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Sept. 3, 2020). As discussed above, the day before absentee voting began, a three-judge panel denied a motion to enjoin North Carolina's requirement that one person witness an absentee ballot. *Id.* at *6. The panel found both that the plaintiffs in *Chambers* were unlikely to prevail on the merits of their claim and also that an injunction would be improper because it would harm *all* North Carolinians and disrupt the election. *Id.* (noting "the equities do not weigh in [plaintiffs'] favor" due to the proximity of the election, the tremendous costs that the injunction would impose on the State, and the confusion such a decision would create for voters."). The concern not to disrupt the November election that the three-judge panel demonstrated in *Chambers* mirrors the concern animating *Purcell.* Yet ***over a month later*** the BOE sought to implement its Numbered Memos and therefore vitiate bipartisan

COVID-19 legislation and effectively overturn the *Chambers* decision to leave the witness requirement in place.

To illustrate the importance of maintaining the status quo, one need look no further than the absentee ballots that have already been spoiled pursuant to the voting laws duly enacted by the General Assembly. IA413, Linda Devore Aff. ¶ 19 (Sept. 30, 2020) ("Before September 28, 2020 voters were notified that their ballot had been spoiled and were mailed a new Absentee Ballot. Hundreds of voters in [Cumberland] county were mailed new Absentee Ballots before September 22, 2020, as a result of witness deficiencies."). Changing the status quo and allowing implementation of the Memos would raise serious questions about treatment of the voters whose ballots have been spoiled. Maintaining the status quo, by contrast, would allow those voters to be contacted and issued new ballots; maintaining the status quo also prevents the following major changes to North Carolina's election code: (1) altering the receipt deadline for mailed-in ballots, which the Consent Judgment would extend from three to nine days after election day, (2) vitiating the statutory requirement for mailed ballots to be postmarked by 5:00 p.m. on election day, and (3) changing the statutory restrictions

on who is permitted to assist with and deliver completed ballots. *See* above at pp. 5–6.

If it was improper in *Andino* to alter the South Carolina absentee ballot witness requirement in ***September,*** it is certainly improper to allow extension of the Ballot Receipt Deadline in mid-October. With less than a month until the election, we are within the "sensitive timeframe" under *Purcell*. *See Purcell*, 549 U.S. at 3 (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"). Aside from confusing citizens who have not yet voted, the inequity is compounded by the fact that voting has been underway for over a month.

By contrast, implementation of the Numbered Memos will continue to wreak havoc on the voting process. The extension of the receipt deadline from three days after Election Day to nine days, in addition to blatantly undermining a statute duly enacted by the General Assembly,

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. *Cf. Common Cause v. Thomsen*, 2020 WL 5665475, at *2 (W.D. Wisc. Sept. 23, 2020) (noting this risk). If these changes are allowed, the voter confusion feared in *Purcell* is a certainty.

The extension of the Receipt Deadline would also be material for election administrators, as it may cause a flood of last-minute ballots that could swamp election officials and risk lost or miscounted votes. This increase, combined with other changes in the Memos (as well as ambiguities in the Memos that administrators would have to resolve) means that county boards will have an ample challenge to complete their canvass in the days between the final day for receipt of absentee ballots specified in the statute, November 6, and the canvass on November 13. Yet, the BOE seeks to reduce the time between last receipt of absentee ballots from six days before the canvass (November 6), to one day (November 12 according to Numbered Memo 2020-22). All this mixed together is a recipe for chaos that significantly disrupts the status quo in this case.

Contrary to the District Court's understanding, *Purcell* does not bar federal courts from exercising their remedial powers to stop this kind of attempted interference with state election laws that amounts to an equal protection violation. Given the backroom deal that the BOE and *Alliance* plaintiffs negotiated without any input or involvement from Plaintiffs-Appellants in this case, the only way to *maintain* the status quo *and protect* the North Carolina election code is to enjoin the implementation of the Numbered Memos and continue what the TRO began. Granting such relief does not violate *Purcell*'s warning against federal court alteration of state court election rules. Instead, maintaining the status quo honors *Purcell* by preventing the wholesale alteration of North Carolina's election code less than three weeks before Election Day.

III. THE REMAINING FACTORS ALSO FAVOR A STAY.

The remaining three factors are also satisfied here. The second and fourth factors—irreparable harm and the public interest—are met because, as the lower court recognized, the Receipt Deadline Extension violates Plaintiffs' constitutional right to equal protection. *See, e.g.*, *League of Women Voters of N.C.*, 769 F.3d at 247 ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *Am. Civil*

Liberties Union Fund of Mich. v. Livingston Cty., 796 F.3d 636, 649 (6th Cir. 2015) ("[W]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights" (internal citation omitted).

Plaintiffs raise these claims on two separate grounds. First, for their claim of vote dilution, Plaintiffs argue that their votes will not be "weighted equally," thereby violating the "one person, one vote principle," because the Numbered Memos create "the possibility of unlawful or invalid ballots being counted." *See* IA253, IA259. Plaintiffs have also sustained injury due to arbitrary and disparate treatment, because "they voted under one set of rules, and other voters, through the guidance in the Numbered Memo[s], will be permitted to vote invalidly under a different and unequal set of rules." *Id.* at 43.

Indeed, two federal judges have already held that Plaintiffs are likely to suffer an equal protection violation should the Board's memos go into effect. In granting their emergency motion for a temporary restraining order, Judge Dever stated that "Plaintiff voters' claims under the Equal Protection Clause raise profound questions concerning

arbitrariness and vote dilution," partly due to the BOE's creation of "multiple, disparate regimes" for casting absentee ballots. IA212-13.

Similarly, Judge Osteen emphasized that "[a] change in election rules that results in disparate treatment shifts from constitutional to unconstitutional when these rules are also arbitrary." IA268. He further found that the BOE engaged in "arbitrary behavior" by altering the Witness Requirement and Receipt Deadline, since those alterations contravened "the fixed rules or procedures the state legislature has established for voting and . . . fundamentally alter[ed] the definition of a validly voted ballot, creating 'preferred class[es] of voters." *Id.* at IA270-77.

The final factor—lack of substantial harm to the Defendants—is also met. Defendants have not persuaded any court that the Receipt Deadline infringes their constitutional rights, and it certainly does not do so. Every voter has within his or her power the ability to simply mail the absentee ballot sufficiently in advance of Election Day for it to be received by the statutory deadline of November 6. Indeed, the evidence shows that the Postal Service delivers over 95% of the mail in North Carolina within 2 days, and a prominent expert has testified that even

ballots sent on Election Day are likely to be received by the November 6 deadline. IA425, IA429. Plunkett Dec. ¶¶ 9, 17. The balance of equities, weighed initially by the General Assembly, weighs heavily in favor of maintaining the statutory deadline.[15] The additional time provided to military and overseas voters recognizes the frequent moves required of military personnel and the challenges of ballot delivery from overseas. Extending the receipt deadline for domestic ballots to equal the one for military and overseas ballots would place military and overseas voters at a relative disadvantage and be inequitable. See IA520, Lockerbie Decl. ¶ 32 .

[15] For example, before the General Assembly enacted HB 1169, it spent a month and a half working on the bill and considered many proposals. IA446, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3. The BOE advanced several proposals, including one to reduce or eliminate the witness requirement for absentee ballots. IA460, State Bd. Mar. 26, 2020 Ltr. at 3. Moreover, the General Assembly had the benefit of information about other primary elections conducted during the pandemic, as well as reports of challenges faced by the United States Postal Service ("USPS"). The General Assembly was also familiar with the recent election in North Carolina's Ninth Congressional District, which was tainted by "absentee ballot fraud" and needed to be held anew, and from that incident understood the importance of restricting who can assist voters with the request for, filling out, and delivery of absentee ballots. *See* IA467, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019).

CONCLUSION

For the reasons stated above, the district court's order should be stayed pending this Court's decision on appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(C), 32(a)(5), and 32(g)(1), I certify that this motion has 4756 words and was prepared using Century Schoolbook, 14-point font.

/s/ Bobby R. Burchfield
Bobby R. Burchfield

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of October, 2020, I caused this Emergency Motion to Stay Injunction Pending Appeal and for Administrative Stay to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record, and that I have electronically mailed the documents to all non-CM/ECF participants.

/s/ Bobby R. Burchfield
Bobby R. Burchfield

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

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

Plaintiffs,

v.

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

Defendants.

Civil Action
No. 1:20-CV-911

NOTICE OF APPEAL

Notice is hereby given that Timothy K. Moore, Philip E. Berger, Bobby Heath, Maxine Whitley, and Alan Swain, Plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Memorandum Opinion and Order denying their Motion for Preliminary Injunction, Doc. 74, entered in this action on the fourteenth day of October, 2020.

Dated: October 15, 2020

Respectfully submitted,

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Local Civil Rule 83.1 Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 15th day of October, 2020, she electronically filed the foregoing Plaintiffs' Motion for Temporary Stay with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
Nicole J. Moss

North Carolina Court of Appeals

DANIEL M. HORNE JR., Clerk

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From Wake
(20CVS8881)

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

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 motions for temporary stay are allowed. The judgment entered on 2 October 2020 by Judge G. Bryan Collins, Jr. in Wake County Superior Court is hereby stayed pending a ruling on the petitions for writ of supersedeas. Responses, if any, to the petitions shall be filed no later than Monday 19 October 2020 by 5 p. m. This Court will rule on the petitions for writ of supersedeas upon the filing of responses to the petitions or the expiration of the time for the responses if no responses are filed.

By order of the Court this the 15th of October 2020.

WITNESS my hand and official seal this the 15th day of October 2020.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
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Hon. Frank Blair Williams, Clerk of Superior Court

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' Emergency Motion for an Injunction Pending Appeal

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October 16, 2020 (counsel listed on reverse)

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LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), Appellants informed Appellees and Intervenor-Appellees of their intent to seek the relief sought in this motion in the district court. Appellees and Intervenor-Appellees opposed that relief below and presumably will do the same here.

INTRODUCTION

Appellants, the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, two North Carolina voters who voted absentee before September 22, 2020, and a candidate running to represent North Carolina's 2nd Congressional District, respectfully petition this Court to issue an injunction enjoining Numbered Memo 2020-22 and Revised Numbered Memo 2020-19 to the extent it incorporates the extended receipt deadline established by Numbered Memo 2020-22 (together, the "Memoranda") pending appeal of the district court's denial of Appellants' motion for a preliminary injunction. Appellants also request that this Court expedite consideration of this motion and temporarily enjoin the Memoranda while this motion is being considered. The district court stayed the court's order pending appeal but only until the temporary restraining order currently enjoining the Memoranda expires at 11:59 p.m. today, October 16. App. 176–78.[1]

The district court found that Appellants demonstrated a likelihood of success on the merits with respect to "their Equal Protection challenge to the Receipt

[1] On October 2, 2020, the North Carolina Superior Court entered a consent judgment requiring the North Carolina State Board of Elections to implement, as relevant here, the extended receipt deadline. *See* App. 35–36. On October 15, 2020, the North Carolina Court of Appeals granted a temporary stay of the consent judgment pending that court's ruling on Intervenor-Defendants'—Berger and Moore—petition for a writ of supersedeas. *See* App. 61–62. The court has indicated that it will rule once response briefs are filed on October 19, 2020.

Deadline Extension" implemented through Numbered Memo 2020-22. App. 125. It explained that this change, issued by the North Carolina State Board of Elections ("NCSBE"), subjects 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. App. 120–25. These actions are thus clear violations of Heath's and Whitley's Equal Protection right to vote on "equal terms" as set out by the Supreme Court. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000); *see also Gray v. Sanders*, 372 U.S. 368, 379–80 (1963); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Notwithstanding the strong merits of Appellants' claims and the evident unconstitutionality of Appellees' actions, however, the district court declined to issue a preliminary injunction with respect to the ballot extension deadline because of its interpretation of the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

The district court's determinations demonstrate that Appellants have a substantial likelihood of prevailing on the merits in this appeal. And whether *Purcell* applies to stay the hand of this Court's equitable power is, at the very least, a close question of law. The requested injunction will maintain the status quo pending appeal. Appellees have, to date, never published Numbered Memo 2020-22 to the NCSBE's website. And the website continues to instruct voters that they must comply with the statutory receipt deadline. *See, e.g.*, App. 64–68. The rules of the

election remain the same today as they have since voting started on September 4. The rules only change if an injunction is *not* entered.

The public interest also favors an injunction pending appeal, as voters face a greater risk of irreparable harm if the Memoranda are implemented and later vacated than if their implementation is delayed. In the event Appellants' appeal fails, voters will not be harmed by ensuring their ballots are received by the statutory receipt deadline that was in place when voting began. But absent an injunction, voters could be harmed if they rely on the Receipt Deadline Extension and *do not* ensure their ballots are received by the statutory receipt deadline and Appellants then succeed on appeal. Appellants therefore request that this Court enjoin the Memoranda pending appeal.

STATEMENT OF THE CASE

Appellees, members of the NCSBE and the NCSBE's Executive Director, have engaged in an unprecedented effort to usurp the North Carolina General Assembly's prerogative to regulate federal elections in North Carolina. Disregarding the clear mandate of the Constitution's Elections Clause, which provides that only the "Legislature[s]" of the several states or Congress may prescribe the time, place, and manner of federal elections, U.S. CONST. art. I, § 4, cl. 1, Appellees, through the NCSBE's Executive Director, have created two Memoranda contravening the General Assembly's duly enacted statutes after the General Assembly had enacted

bipartisan legislation addressing voting during the pandemic this November. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169"). The Memoranda will substantially change North Carolina's duly enacted election laws by extending the absentee ballot receipt deadline from three to nine days after election day and amending the postmark requirements for ballots received after election day. And they did so after over 150,000 absentee ballots had been cast.[2] Because these Memoranda will be issued while voting is ongoing, Appellees will be applying different rules to ballots cast by similarly situated voters, thus violating the Equal Protection Clause in two distinct ways: Appellees 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 Memoranda were announced to participate in the election on an equal basis with other citizens in North Carolina, and Appellees will be purposefully allowing otherwise unlawful votes to be counted, thereby diluting North Carolina voters' lawful votes.

Appellees are disserving North Carolina voters and sowing considerable confusion through their Memoranda and ever-changing directives. As the district court held, Appellants have established a likelihood of success on their Equal Protection challenges regarding the deadline extension for receipt of ballots. App.

[2] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 16, 2020), *available at* https://bit.ly/33SKzAw.

71. For these and the reasons explained below, Appellants respectfully request that the Court grant their motion for an injunction pending appeal.

JURISDICTIONAL STATEMENT

The district court denied Appellants' motion for a preliminary injunction on October 14, 2020. App. 69–159. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). On October 15, the district court stayed its ruling through October 16 but otherwise declined to grant Appellants' motion for an injunction pending appeal on October 15, 2020. *See* App. 176–78; FED. R. APP. P. 8(a)(2)(A)(ii).

ARGUMENT

This Court considers four factors when determining whether to issue an injunction pending appeal:

> (1) whether the . . . applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent [an injunction pending appeal]; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); *accord Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). These factors counsel in favor of issuing an injunction in this case.

I. Appellants Have a Substantial Likelihood of Prevailing on the Merits In This Appeal

A. The Memoranda Violate 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." Since neither Congress nor the General Assembly promulgated the NCSBE's Memoranda, they are unconstitutional because they overrule the enactments of the General Assembly to regulate the times, places, and manner of holding the ongoing 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*, 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.

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. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015), 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 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 the Memoranda, which purport to adjust the rules of the election that have already been set by statute. But the NCSBE does not have freestanding power under the U.S. Constitution to rewrite North Carolina's election laws and to "prescribe[]" its 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. Thus, the NCSBE is not 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 WL 8106156, at *3 (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.*, 249 S.E.2d 402, 410 (N.C. 1978).

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), *see Cooper v. Berger*, 809 S.E.2d 98, 112 (N.C. 2018), the NCSBE would lack authority to do so here. 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* 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. In enacting HB1169, the General Assembly already decided what adjustments to the election laws are necessary to account for the pandemic.

Furthermore, contrary to the district court's determination, *see* App. 140–43, Moore and Berger have standing to raise their Elections Clause claims. Moore and Berger are agents of the General Assembly to protect its institutional right as the "Legislature" of North Carolina to regulate federal elections. The Supreme Court has made clear that "a State must be able to designate agents to represent it in federal

court." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And North Carolina has made abundantly clear that "[*w*]*henever* the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the *subject* of an action in *any* State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties" N.C. GEN. STAT. § 120-32.6(b) (emphases added). In this case, the General Assembly, acting through its agents Moore and Berger, asserts that the validity of its election laws has been usurped by the Memoranda. Since "state law authorizes legislators to represent the State's interests," Moore and Berger "have standing." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

B. The Memoranda Violate 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*, 531 U.S. at 105; *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Gray*, 372 U.S. at 380 ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court's] decisions."). "[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.

The district court found that Appellants demonstrated a likelihood of success on the merits with respect to "their Equal Protection challenge to the Receipt Deadline Extension" implemented through Numbered Memo 2020-22 because that change subjects Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. App. 120–25. Appellants also submit that the Memoranda violate Heath and Whitley's right to have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29.

1. Arbitrary and Nonuniform Election Administration

The Memoranda will cause North Carolina to administer its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. North Carolina requires absentee ballots to be received, at the latest, by 5:00 p.m. three days after election day. The Memoranda, by contrast, allow absentee ballots to be received up to *nine days* after election day. *See* App. 46–54. This is in violation of the General Assembly's duly enacted statutes but would also be a change in the rules while voting is ongoing. The statutory receipt deadline governed the absentee ballot submission process when Heath and Whitley submitted their ballots. Allowing the Memoranda to go into effect would thus be a sudden about-face on the rules governing the ongoing election that will upend the careful bipartisan framework that has structured voting so far.

Accordingly, under the Memoranda, 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 Memoranda were unveiled, including Heath and Whitley, and therefore worked to comply with the statutory ballot receipt deadline. By contrast, under the Memoranda, voters whose ballots would otherwise not be counted if received more than three days after election day will have an additional six days to return their ballot. The district court found this regime to be an arbitrary procedure that will result in disparate treatment, and therefore violative of Heath's and Whitley's Equal Protection rights. App. 125–27. Consequently, Appellants have a substantial likelihood of prevailing on the merits of this claim in this appeal.

2. Vote Dilution

Under the Memoranda 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 Memoranda ensure that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in two ways: (1) by allowing absentee ballots to be counted if received up to nine days after election day, *see* App. 46–54; and (2) by allowing absentee ballots without a postmark to be counted in certain circumstances

if received after election day, *id.* These changes will have the direct and immediate effect of diluting the votes of North Carolina voters by enabling unlawful votes.

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, even if many other voters suffer the same injury. *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker*, 369 U.S. at 208. And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals"—be it from malapportioned districts or racial gerrymanders or, as here with Heath and Whitley, the counting on unlawful ballots—"have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal quotation marks omitted). Indeed, the Supreme Court in *Reynolds* made clear that impermissible vote dilution also occurs when there is "ballot-box stuffing," a form of dilution that disadvantages all those who cast lawful ballots. 377 U.S. at 555. 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 voters like Heath and Whitley. *See Gill*, 138 S. Ct. at 1929; *Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208.

The district court did not address the merits of this claim because it found that Heath and Whitley did not have standing to assert it. App. 108–11. But Heath and Whitley are not asserting merely a generalized right. They are asserting that Appellees are violating the one-person, one-vote principle. Dilution of Heath's and Whitley's lawful votes, to any degree, by the casting of unlawful votes, violates their right to vote, even if many other voters suffer the same injury. *See Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208. And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill*, 138 S. Ct. at 1929 (internal quotation marks omitted). And it is simply not true that every voter in the state has standing to challenge these mid-election rule changes: those voters whose ballots were invalid under the regime that existed at the time voting commenced, but whose ballots will now be counted, obviously do not have standing to complain of these changes.

Even if it were true that vote dilution is a viable basis for federal claims only when "the injury is to a specific group of voters," App. 110, Heath and Whitley would still have standing. Heath and Whitley are registered Republican voters who have submitted their absentee ballots,[3] and the North Carolina absentee voting data

[3] Bobby Glen Heath Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Maxine Barnes Whitley Voter

demonstrates that the Memoranda disproportionately benefit registered Democrat voters over registered Republican voters. As of October 15, 2020, Democrats have requested 628,788 absentee ballots and returned 269,844, while Republicans have requested 258,413 absentee ballots and returned 96,051.[4] That means that 358,944 Democrat absentee ballots remain outstanding, versus 162,362 Republican. Consequently, Democrats will disproportionally benefit from the changes the Memoranda make that unlawfully relax the rules governing absentee voting.

II. Irreparable Harm and the Public Interest Counsel in Favor of Granting an Injunction Pending Appeal

The two remaining factors this Court must assess in considering Appellants' motion for an injunction pending appeal—irreparable harm and the public interest—counsel in favor of granting that motion.

A. Irreparable Harm

First, an injunction will *prevent* irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws. As the district court recognized, "[o]nce the election occurs, there can be no do-over and no redress," so "[t]he injury to these voters is real and completely irreparable if nothing is done." App. 134. This rationale extends to the injunction

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Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL.

[4] *North Carolina Early Voting Statistics*, U.S. ELECTIONS PROJECT (Oct. 16, 2020), https://bit.ly/3jcBVCV.

pending appeal context too as the casting of votes under unconstitutional Memoranda even for a short period of time will irreparably harm Heath and Whitley's right to vote on an equal basis. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for *even minimal periods of time*, unquestionably constitutes irreparable injury." (emphasis added)). The Memoranda also inflict irreparable institutional harm to the General Assembly as well by nullifying its statutes and depriving it of its prerogative under the Elections Clause. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). Consequently, an injunction pending appeal will *prevent* irreparable harm, not engender it.[5]

[5] What is more, at least five of the individual Intervenor-Appellees—Barker Fowler, Tom Kociemba, Rosalyn Kociemba, Rebecca Johnson, and Sandra Malone—*have already voted*. *See* Susan Barker Fowler Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Thomas John Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Rosalyn Cotter Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Rebecca Kay Johnson Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Sandra Jones Malone, Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL. Consequently, enjoining the Memoranda pending appeal would not injure them whatsoever.

B. The Public Interest

Second, the public interest would be served by granting an injunction pending appeal. The public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members and civil litigants. Also, because the Memoranda unconstitutionally alter duly enacted election laws, enjoining them "is where the public interest lies." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (2020) (internal quotation marks omitted).

Without an injunction, and if the state court stay is lifted, the NCSBE may seek to immediately issue and enforce the likely unconstitutional Memoranda. But the immediate issue of the Memoranda will only add to voter confusion given the likelihood of Appellants' success. After all, the NCSBE has not yet published Numbered Memo 2020-22 to its website. Since it is a close question as to whether relief is warranted under *Purcell*, the best way to provide "public confidence in the integrity of the electoral process" is to issue an injunction to preserve the status quo without the Receipt Deadline Extension in place. *See Crawford v. Marion Cnty. Election Bd.*, 552 U.S. 181, 197 (2008) (controlling opinion of Stevens, J.). This is the only way to ensure that the NCSBE does not engage in yet further policy changes and unconstitutional actions that may be halted on appeal.

Furthermore, an injunction pending appeal will provide certainty to the public on the procedures that apply during the election and promote confidence in the

election. It will avoid substantial confusion, among both voters and election officials, by preventing a change to 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) (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. 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 cause disparate treatment of voters in the ongoing election. *See* Reply Brief of the State Board Defendants-Appellants at 8, Doc. 103, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020) ("[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, 27–35.

Finally, contrary to the district court's determination, *see* App. 135–37, *Purcell* does not apply to stay the hand of this Court's equitable power. The Supreme Court has repeatedly counseled that lower courts should not *change* or *alter* election rules prior to or during an election. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207. This principle seeks to avoid "voter confusion" caused by an election-altering "[c]ourt order[]." *Purcell*, 549 U.S. at 4–5. The *Purcell* principle attempts to ensure

federal courts do not disrupt the status quo ante of an ongoing election. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207.

But the relief Appellants seek in this case is not the election-altering court order that animated the *Purcell* principle. *Cf. Self Advocacy Sols. N.D. v. Jaeger*, No. 20-cv-71, 2020 WL 2951012, at *11 (D.N.D. June 3, 2020) ("The concerns that troubled the Supreme Court in *Purcell* are not present in this instance."). Instead, the relief Appellants seek is to prevent the NCSBE from implementing the unconstitutional Receipt Deadline Extension and alteration of the postmark requirement, which are election-altering and midstream changes likely to cause the very voter confusion that the *Purcell* principle seeks to prevent. Indeed, Numbered Memo 2020-22, which establishes the Receipt Deadline Extension, has yet to be published on the NCSBE's website, *see* App. 161–75, and NCSBE continues to instruct voters to adhere to the statutory receipt deadline and postmark requirements, App. 64–68. In this instance, the best means to vindicate the *Purcell* principle is to stop the unconstitutional election-altering change put forward by the NCSBE. *Cf. Ely v. Klahr*, 403 U.S. 108, 113 (affirming district court that, in order to avoid "serious risk of confusion and chaos" chose the "lesser of two evils" for the 1970 elections). In any event, Appellants submit that how *Purcell* applies to Appellants' requested relief is a close enough question to merit an injunction while this Court considers Appellants' appeal.

Accordingly, irreparable harm and the public interest weigh in favor of granting Appellants' motion.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant their motion for a temporary injunction pending appeal. Appellants also request that this Court expedite consideration of this motion and temporarily enjoin the Memoranda while this motion is being considered.

Dated: October 16, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(a). The motion is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 4,895 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 motion 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

FILED: October 19, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2104 (L)
(1:20-cv-00912-WO-JLW)

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees,

and

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

Intervenors/Defendants – Appellees.

No. 20-2107
(1:20-cv-00911-WO-JLW)

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

Plaintiffs – Appellants,

v.

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

Defendants – Appellees,

and

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

Intervenors/Defendants – Appellees.

O R D E R

A majority of judges in regular active service and not disqualified having voted in a requested poll of the court for hearing en banc on the motions for injunction pending appeal filed in No. 20-2104, *Wise v. Circosta*, and No. 20-2107, *Moore v. Circosta*, the court grants hearing en banc and consolidates the appeals for further proceedings.

For the Court

/s/ Patricia S. Connor, Clerk

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.)

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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.

[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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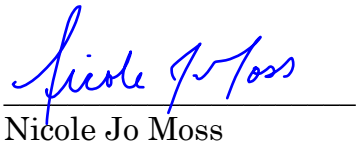

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No. _____ TENTH JUDICIAL DISTRICT

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: */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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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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N.C.G.S. § 163-22.2. Power of State Board to promulgate temporary rules and regulations.

In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of this Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes. (1981, c. 741; 1982, 2nd Ex. Sess., c. 3, s. 19.1; c. 1265, ss. 1, 2; 1985, c. 563, s. 15; 1986, Ex. Sess., c. 3, s. 1; 2017-6, s. 3; 2018-146, s. 3.1(a), (b).)

N.C.G.S. § 163-27.1. Emergency powers.

(a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following: (1) A natural disaster. (2) Extremely inclement weather. (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States. In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this Chapter. The Executive Director shall adopt rules describing the emergency powers and the situations in which the emergency powers will be exercised. (b) Nothing in this Chapter shall grant authority to the State Board of Elections to alter, amend, correct, impose, or substitute any plan apportioning or redistricting State legislative or congressional districts other than a plan imposed by a court under G.S. 120-2.4 or a plan enacted by the General Assembly. (c) Nothing in this Chapter shall grant authority to the State Board of Elections to alter, amend, correct, impose, or substitute any plan apportioning or redistricting districts for a unit of local government other than a plan imposed by a court, a plan enacted by the General Assembly, or a plan adopted by the appropriate unit of local government under statutory or local act authority. (1999-455, s. 23; 2001-319, s. 11; 2011-183, s. 110; 2016-125, 4th Ex. Sess., s. 20(d); 2017-6, s. 3; 2018-146, s. 3.1(a), (b))