

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:20-cv-457

DEMOCRACY NORTH CAROLINA, *et al.*,
Plaintiffs,
v.
THE NORTH CAROLINA STATE
BOARD OF ELECTIONS; *et al.*,
Defendants,
and
PHILIP E. BERGER, etc., *et al.*,
Intervenors.

**STATE DEFENDANTS' RESPONSE
TO MOTION FOR
PRELIMINARY INJUNCTION
[DE 9]**

NOW COME 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; Ken Raymond, Jeff Carmon III, and David C. Black, in their official capacities as Members of the State Board of Elections; Karen Brinson Bell, in her official capacity as Executive Director of the State Board of Elections; the North Carolina Department of Transportation; J. Eric Boyette, in his official capacity as Transportation Secretary; the North Carolina Department of Health and Human Services; Mandy Cohen, in her official capacity as Secretary of Health and Human Services (collectively “the State Defendants”)—and hereby respond to the Motion for Preliminary Injunction filed by plaintiffs on 5 June 2020 [DE 9].

INTRODUCTION

Plaintiffs filed this action on 22 May 2020. Through it, they challenge various provisions of North Carolina election law, alleging that in the context of the COVID-19 pandemic, those election law provisions infringe on their rights under the United States Constitution and federal statutes. Plaintiffs filed their First Amended Complaint [DE 8] and their Motion for Preliminary Injunction [DE 9] on 5 June 2020.

In their motion, plaintiffs seek to have this Court enter a variety of mandatory and prohibitive injunctions against the State defendants. The mandatory and prohibitive injunctive relief they seek ranges from eliminating the witness requirement for absentee ballots and the registration deadline of 25 days before the election to requiring that the State defendants provide drop-boxes for absentee ballot requests and ordering a “remedial plan to educate voters regarding their options to register to vote and obtain and cast a ballot.” [DE 31 at 8.]

While many of the measures that plaintiffs seek might be appropriate choices to make from a policy perspective, the record before the Court does not establish that they are appropriate subjects for a preliminary injunction. This Court should not attempt to take on the role of state legislature and state executive—deciding what election policies shall have the force of law in North Carolina as well as directing the execution of those policies. The purpose of a preliminary injunction is to preserve the status quo and protect the rights of the plaintiffs pending litigation.

Plaintiffs have failed to show that they are likely to succeed on the merits of their claims. And they have failed to show that the balance of the equities tips in their favor.

The balance of the equities as well as the public interest require that the mandatory and prohibitive injunctions plaintiffs seek be denied. Much of the relief sought would place an enormous, if not insurmountable, strain on the State's administration of the 2020 election—an election already under strain due to the COVID-19 pandemic—in order to remedy minimal and even non-existent burdens on plaintiffs' rights. The Court should not accept Plaintiffs' invitation to administer North Carolina's election procedures.

The motion for preliminary injunction should be denied.

STATEMENT OF THE FACTS

The effects of the novel coronavirus strain known as COVID-19, both on public health and on a wide variety of activities is, by now, well-known. The COVID-19 pandemic has been widely recognized as the greatest global health crisis in at least a century. In North Carolina, more than 56,000 people have had laboratory confirmed cases of COVID-19, and more than 1,200 people have died from the disease. (*See* Executive Order No. 147, issued 24 June 2020.)

The first case of COVID-19 was identified in North Carolina on March 3, 2020, which happened to be the day of North Carolina's primary election. On 10 March 2020, the Governor of North Carolina, Roy Cooper, declared a State of Emergency, as defined in N.C. GEN. STAT. §§ 166A-19.3(6) and 166-19.3(19), to address the COVID-19 public health emergency and provide for the safety of people in the State. The World Health Organization declared COVID-19 a global pandemic on 11 March 2020. On 13 March 2020, the President of the United States declared the COVID-19 outbreak a national emergency, retroactive to 1 March 2020. On 25 March 2020, the President of the United

States approved a Major Disaster Declaration for the State of North Carolina. (*Id.*)

In the time since the Governor declared a State of Emergency on 10 March 2020, North Carolina officials have undertaken numerous actions both to contain the pandemic and to make appropriate adjustments and accommodations to how citizens engage with government agencies. The Governor has issued 25 Executive Orders, including most recently Executive Order 147, issued just two days ago, on 24 June 2020. These Executive Orders have imposed restrictions designed to slow the spread of COVID-19, but they have also included numerous measures designed to protect the people of North Carolina in ways other than health. For example, Executive Order Nos. 124 and 142 imposed and extended a prohibition of utility shut-offs for persons having trouble paying their utility bills. (See Executive Order No. 142, issued 30 May 2020). Executive Order No. 142 also implemented a temporary moratorium on evictions for inability to pay rent. (*Id.*)

Likewise, the Chief Justice of North Carolina, Cheri Beasley, and the North Carolina Supreme Court have issued a number of orders related to the business of North Carolina's court system. These orders have addressed matters from access to courthouses, provision for virtual hearings and trials and procedures for jury trials, to extensions of deadlines and statutes of limitation, moratoriums on certain types of hearings, including eviction hearings and provision for magistrates to conduct marriage ceremonies. (*See* Orders of the Chief Justice issued 13 March 2020, 19 March 2020, 2 April 2020, 13 April 2020, 16 April 2020, 1 May 2020, 21 May 2020, 30 May 2020 and 20 June 2020; Orders of the North Carolina Supreme Court issued 27 March 2020 and 14 May 2020.)

With regard to election matters, Bell, as Executive Director of the NCSBE has taken

numerous actions to ensure that elections—particularly the 23 June 2020 elections—can proceed smoothly and safely for voters and for poll workers. On 15 March 2020, she issued Numbered Memo 2020-11 to the 100 county boards of elections in North Carolina, updating them on State Board’s responses to the COVID-19 outbreak and providing recommendations to ensure that elections administration could proceed. (*See* Ex. 1. Declaration of Karen Brinson Bell, ¶ 6.) That numbered memo recommended that county boards conduct board meetings telephonically, if possible, and indicated that the deadline for county boards of elections to sort ballots by precinct under N.C. GEN. STAT. § 163-132.5G would be extended by Bell by at least 30 days. (*Id.*, ¶ 6.) It also announced the creation of a COVID-19 Task Force to discuss both short-term and long-term needs related to the pandemic and voting. (*Id.*, ¶ 6.) The COVID-19 Task Force is composed of state and county elections officials. It has provided input regarding legislative recommendations to administer elections during the pandemic, necessary measures for the expected increase in mail balloting as well as efforts that must be taken to ensure the health and well-being of voters and election workers during in-person voting, and considerations for uses and allocation of federal funding among the county boards of elections. (*Id.*, ¶ 6.)

On 20 March 2020, pursuant to N.C. GEN. STAT. § 163-27.1 and an amendment adopted by Emergency Rule to 08 NCAC 01 .0106, Bell issued an order rescheduling the Republican second primary in Congressional District 11 (“CD 11”) from 12 May 2020 to 23 June 2020.¹ (*Id.*, ¶ 8.) The order stayed consideration of election protests until 20 May

¹ N.C. GEN. STAT. § 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

2020, extended the deadline for county boards to sort ballots by precinct to that same date, required county board offices that are closed due to the pandemic to provide a secure lock-box for the public to deposit election-related forms, and suspended the requirement to keep a log of absentee request forms dropped off in person. (*Id.*, ¶ 8.) The order also permitted the transfer of voters to a non-adjacent precinct if the transfer was related to the COVID-19 pandemic. (*Id.*, ¶ 8.) For the second primary on 23 June 2020, voters in 11 precincts were transferred to non-adjacent precincts, reflecting a total of 9,019 eligible voters transferred. (*Id.*, ¶ 8.)

On 1 June 2020, Bell issued Numbered Memo 2020-12, which provided guidance to the county boards of elections conducting in-person voting for the 23 June 2020 second primary in CD 11 and the new primary in Columbus County. (*Id.*, ¶ 10.) The memo established policies to provide a safe experience for voters and elections officials during the COVID-19 pandemic, including requiring poll workers and early voting workers to wear personal protective equipment (“PPE”), including masks, face protection, and gloves, when appropriate, and to self-screen for symptoms prior to reporting to work. (*Id.*, ¶ 10.) Voters who present to vote were provided with masks if they needed one, hand sanitizer, and single use pens and cotton swabs, if voting by ballot-marking device. Routine

for the election is disrupted” by various events, including “[a] natural disaster.” 08 N.C.A.C. 01 .0106 addresses circumstances under which the Executive Director can exercise those emergency powers, and provides that “natural disaster” includes a “[c]atastrophe arising from natural causes resulting in a disaster declaration by the President of the United States or the Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration issued under G.S. 166A19.3(19).” The emergency rule was designed to clarify that a “[c]atastrophe arising from natural disasters” included a pandemic.

cleanings took place throughout the day at each voting place, and social distancing measures were in place as recommended by the Center for Disease Control (“CDC”). County boards of elections were encouraged to assign additional roles for precinct officials, including interior line control worker, door control worker, exterior line control worker and sanitizer worker. (*Id.*, ¶ 10.)

Moreover, during a bimonthly webinar with directors of the county boards of elections on 10 June 2020, Bell informed the directors of her commitment to maintaining election-day precincts as they are and avoiding precinct mergers whenever possible for general elections. As discussed above, precinct transfers were permitted in some cases in 11 counties for the Republican second primary in CD 11. These changes were permitted because of the low turnout expected for that primary and because of the time frame in which the election was taking place, which in some cases made it difficult to secure alternative sites that would allow for social distancing needs. For the general election, on the other hand, it will be important to keep as many precincts open as possible to prevent long lines and to allow for greater social distancing. If a polling place needs to be closed because of a case of COVID-19, a greater number of polling places overall will lessen the impact. Reducing the total number of individuals who vote at a given site will also reduce the potential exposure to COVID-19. For the same reasons, Bell has also advised county boards of elections that they should increase the number of one-stop sites. (*Id.*, ¶ 12.)

The State Board has also taken action to ensure that voting options are easily available to all North Carolina voters. For example, pursuant to N.C. GEN. STAT. § 163-278.69, the State Board will send a Judicial Voter Guide to every North Carolina household

prior to the November general election. The State Board plans to include a blank absentee ballot request form in the Guide. The form will be on heavier weight paper than the rest of the guide, which is necessary to ensure the form can be readily scanned into the Statewide Elections Information Management System (SEIMS). The Guide will include a link to the online absentee request portal that will be available beginning 1 September 2020, as required by 2020 N.C. Sess. Laws 17. It will also inform voters about recent changes to election laws and measures that are being taken to ensure voter safety for in-person voting. (*Id.*, ¶ 11.)

Moreover, the State Board announced on 19 June 2020, that it is seeking “democracy heroes” to serve as election officials at early voting and on Election Day. A link is available on the State Board’s website for individuals to express their interest, which will be provided to the appropriate county board of elections. This effort is part of a broader effort to recruit poll workers to serve in 2020. Other efforts will include recruiting from veterans groups and university students.

The North Carolina General Assembly has also taken action to adjust North Carolina’s elections procedures in light of the dangers and constraints presented by the COVID-19 pandemic. On 11 June 2020, the General Assembly enacted House Bill 1169, entitled “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.” The Governor signed this bill into law the following day, 12 June 2020, and it was designated Session Law 2020–17. This act made a number of changes to election laws. For example, the requirement of two witnesses for absentee ballots was reduced to

one witness. 2020 N.C. Sess. Laws 17, § 1.(a). In addition, county boards of elections now have greater flexibility to allow non-resident precinct officials to serve, which will help ensure that each polling places remains open even if some current precinct officials are unable or decline to serve. 2020 N.C. Sess. Laws 17, § 1.(b). Individuals working as part of a bipartisan team trained and authorized by county boards of elections can assist any voter in the completion of a request form for absentee ballots or in delivering a completed request form for absentee ballots to the county board of elections and may serve as a witness for the casting of absentee ballots. 2020 N.C. Sess. Laws 17, § 1.(c). These bipartisan teams can, in accordance with guidelines developed by the State Board and the Department of Health and Human Services, assist voters in “hospitals, clinics, nursing homes, assisted living or other congregate living situations.” 2020 N.C. Sess. Laws 17, § 2.(b). Additionally, voters will be able to request absentee ballot request forms online. 2020 N.C. Sess. Laws 17, § 7.(a).

Session Law 2020–17 also provided state matching funds for the grant to the State under the federal CARES Act (P.L. 116-136), which makes a total of \$13,067,636 available North Carolina. This money may be used, in part, to purchase necessary personal protective equipment (“PPE”) for the general election, and should be sufficient to provide adequate supplies of PPE to all 100 county boards of elections for the general election. (Bell Decl., ¶ 44.) The State Board has worked and will continue to work with county boards of elections to assist them in procuring PPE, and is coordinating with the Emergency Management Division of the North Carolina Department of Public Safety to procure gloves, disinfecting wipes, face shields and masks for the general election. (Bell Decl., ¶

43.) A donation of hand sanitizer to supply to county boards of elections statewide is also for the general election. (Bell Decl., ¶ 43.)

Bell and the State Board continue to monitor the developing challenges presented by COVID-19 so that they can plan and exercise their authority to ensure that all voters are able to vote, that voters and poll workers are safe and that the 2020 election is administered in an orderly manner. (Bell Decl., ¶ 17.)

QUESTION PRESENTED

1. Whether plaintiffs have established that they are entitled to preliminary injunctive relief.

LEGAL STANDARD

“A preliminary injunction is ‘an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief’ and may never be awarded ‘as of right.’” *Mt. Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P’ship*, 918 F.3d 353, 366 (4th Cir. 2019) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 24 (2008)). “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*, 555 U.S. at 20.

Plaintiffs have the burden of proof on each factor. *Winter*, 555 U.S. at 20. Additionally, a plaintiff must show that success on the merits is likely regardless of whether the balance of hardships weighs in his favor. *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). This

burden requires more than simply showing that “grave or serious questions are presented.”
Id. at 346-47.

Where, as here, plaintiffs seek not only an injunction that preserves the status quo, but one that imposes affirmative requirements on defendants, the standard plaintiffs must satisfy is higher. “[W]hen the preliminary injunction is ‘mandatory rather than prohibitory in nature,’ th[e] Court’s ‘application of this exacting standard of review is even more searching.’” *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003)).

“Mandatory preliminary injunctions [generally] do not preserve the status quo and normally should be granted only in those circumstances when the exigencies of the situation demand such relief.” *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980); *see Calvary Christian Ctr. v. City of Fredericksburg*, 800 F. Supp. 2d 760, 765 (E.D. Va. 2011) (“The Fourth Circuit has viewed mandatory relief with caution . . .”). “That is to say, a mandatory preliminary injunction must be necessary both to protect against irreparable harm in a deteriorating circumstance created by the defendant and to preserve the court’s ability to enter ultimate relief on the merits of the same kind.”

Int’l Labor Mgmt. Corp. v. Perez, No. 1:14CV231, 2014 U.S. Dist. LEXIS 57803, *45-46 (M.D.N.C. Apr. 25, 2014) (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d at 526).

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

The plaintiffs have requested that this Court order a number of different mandatory and prohibitive measures against the State Defendants on the grounds that the State’s elections statutes related to registration, absentee voting, and in-person voting

unconstitutionally restrict their access to the ballot—particularly in light of the COVID-19 pandemic.

The State Defendants do not doubt that the COVID-19 pandemic has burdened voters and voter-education organizations like the plaintiffs. Indeed, it has burdened the State Defendants as well, causing them to devote significant time and resources to managing the COVID-19 pandemic and creating alternative plans and procedures to ensure that every eligible North Carolinian has the opportunity to vote. But while the plaintiffs may have heightened concerns and even reasonable policy disagreements with North Carolina law, they have not shown that failure to adhere to the plaintiffs’ judgment about best practices is a constitutional violation requiring injunction.

State election regulations often “implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments.” *Pisano v. Strach*, 743 F.3d 927, 932 (4th Cir. 2014) (citation omitted). “All election laws, including perfectly valid ones, ‘inevitably affect[]—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Sarvis v. Alcorn*, 826 F.3d 708, 716 (4th Cir. 2016) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). To identify those laws that unconstitutionally burden rights guaranteed by the First and Fourteenth Amendments, courts weigh: (1) the character and magnitude of the asserted injury to First and Fourteenth Amendment rights against (2) the State’s interests and justifications for the burden imposed. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). If the burden to a plaintiff’s rights is severe, courts apply strict scrutiny to the plaintiff’s claim. *Pisano*, 743 F.3d at 936. If the burden to a plaintiff’s rights is modest, courts simply ensure that “order,

rather than chaos, . . . accompany the democratic process.” *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995).

A. Violations of Plaintiffs’ Constitutional and Federal Statutory Rights

The plaintiffs ask this Court to preliminarily enjoin the State Defendants from violating their “constitutional and federal statutory rights with respect to any election in the state for the November 3, 2020, general election.” DE 31 at 6. The plaintiffs do not support this broad request for relief with argument in their brief. Nevertheless, the State Defendants assure this Court that they have no intention of seeking to violate any North Carolinian’s constitutional or federal statutory rights—with respect to voting or any other action.

Moreover, it is axiomatic that an injunction must “describe in reasonable detail . . . the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(C). One of the purposes of this requirement is to “give parties subject to the injunction proper notice of the prohibited conduct.” *Scardelletti v. Rinckwitz*, 68 F. App’x 472, 479 (4th Cir. 2003). A general direction not to violate constitutional or statutory rights does not give adequate guidance to the parties. *See TFFI Corp. v. Williams*, No. 8:13-cv-01809, 2013 U.S. Dist. LEXIS 165029, at *13 (D. Md. Nov. 20, 2013) (declining to issue an injunction prohibiting the defendants from “destroying or altering documents” because the request was not made “with the requisite degree of specificity”).

Accordingly, the plaintiffs’ request for such an injunction should be denied.

B. Voter Registration Deadlines

The plaintiffs claim that the COVID-19 pandemic renders North Carolina's voter-registration deadline an unconstitutional burden on the right to vote. But the voter registration deadlines impose no more than a modest burden when weighed against the State's legitimate interests in elections administration.

North Carolina's voter-registration requirement allows a voter to register by the voter registration deadline (25 days before the election) or in-person at a one-stop site. Bell Decl., ¶ 20. The plaintiffs argue that the State Defendants are burdening their right to organize or vote by not allowing remote (*i.e.*, by mail or online) voter registration at the same time the State Board of Elections allows in-person registration at a one-stop site. Deadlines like these have been held by this Circuit as—at most—a modest burden because voters will have had ample time and opportunity before the election to register. *See, e.g., Pisano*, 743 F.3d at 936 (holding that filing deadlines for new political parties to nominate candidates impose only a modest burden because candidates will have had ample time and opportunity to collect the required number of signatures).

The plaintiffs have also failed to show that the COVID-19 pandemic renders these burdens more severe. The plaintiffs argue that the COVID-19 pandemic has limited voter registration opportunities. DE 10 at 18. But they have not shown why their voter registration initiatives—which are reportedly in-person—cannot succeed under the current statutes with reasonable health precautions and to include encouragement to register by the deadline or register in-person at a one-stop site.

Because the burden of the voter-registration deadline is modest, the plaintiffs must show that the government's interests in maintaining these deadlines is unjustified. They cannot.

Every voter in North Carolina must have her address verified before her vote may count. Bell Decl., ¶ 20. A voter who registers by the regular deadline must be verified by mail—if the verification does not return as undeliverable, the county board will register the voter. *Id.*, ¶ 20. Voters who register at one-stop sites must show proof of residence when they register and are also subject to the mail verification process. *Id.*, ¶ 21. They also vote retrievable ballots in the event that their eligibility is challenged. *Id.*, ¶ 21.

One of the justifications for the 25-day deadline is that it ensures that voters receive verification mailings—voters who register after the 25-day deadline may not receive their mailings before Election Day. *Id.*, ¶ 21.

The 25-day deadline is also important to reduce voter confusion. After the registration deadline, county boards of elections prepare electronic pollbooks that contain a list of registered voters in the county. *Id.*, ¶ 22. A voter who registers after the registration deadline would not appear on pollbooks. *Id.*, ¶ 22. Voters may be required to reregister if they opt to vote early, which would cause confusion, or may not find themselves on the pollbooks at all on Election Day, which would disenfranchise them. *Id.*, ¶ 22.

Finally, the 25-day deadline is important to allow the State and county boards of elections to process registration forms. Typically, a very high volume of forms are received at the end of the voter registration deadline. *Id.*, ¶ 23. County boards of elections will not

be prepared to handle the volume of applications that, based on past data, the State Defendants anticipate arriving close to Election Day. *Id.*, ¶¶ 23-26.

The need for finality, reducing voter confusion, and ensuring that all voters produce proof of residence are all important justifications for the registration deadline. These justifications outweigh the modest burden imposed by a deadline 25 days before Election Day.

C. Establishing Online Voter Registration Processes with the DMV and DHHS to Extend After the Voter Registration Deadline

The plaintiffs also request that the Court order the DMV and DHHS to “process voter registrations online and receive in their offices up until and including 5:00 pm on the last Saturday of early voting” for the 2020 general election. DE 31 at 6. The lack of an online registration process with the DMV and DHHS to extend beyond the voter registration deadline, however, does not pose undue burden on a North Carolinian’s right to vote.

As discussed above, the voter registration deadline does not present an undue burden on the right to vote. Accordingly, just as this Court should decline to order the State Board of Elections to extend the voter registration deadline, it should also decline to order DMV and DHHS to continue to process voter registrations online after the deadline.

The plaintiffs’ request also misapprehends the nature of DMV’s and DHHS’s roles in voter-registration-application processing. When voters register to vote through DMV’s services, DMV gathers all applications at the close of each business day and transmits them immediately to the State Board of Elections—whether the DMV receives these applications

before the deadline or after the deadline. Exh 2, Declaration of T. Jessup (Jessup Decl.), ¶¶ 5-8. DHHS follows a similar protocol—when voters register to vote through DHHS, DHHS promptly transmits the applications to the county boards of elections. N.C. GEN. STAT. § 163-82.20. Neither DHHS nor DMV does any further processing of voter registration applications. Therefore, because neither DHHS nor DMV enforces the voter registration deadline, this Court should not require that the DMV and DHHS, for the first time, begin performing elections-administration functions that the State Board of Election typically performs.

Moreover, plaintiffs are not likely to succeed on the merits because the defendants they have sued cannot provide the relief they request. Plaintiffs specifically allege that DHHS should offer online voter registration through “the Division of Social Services, Division of Public Health/WIC, and Division of Services for the Blind—all divisions of Defendant N.C. Department of Health and Human Services” (Amended Complaint ¶ 53) Plaintiffs fail to acknowledge that although the Division of Services for the Blind is a DHHS agency, the WIC program and public assistance programs are administered by local county agencies, not the DHHS. (Exh 3, Declaration of Tonya L. Prince ¶ 4; Exh 4, Declaration of Mary Anne Burghardt ¶ 5)

D. Absentee Ballot Request Forms

The plaintiffs also challenge the requirement that voters submit a completed version of the State’s absentee ballot request form, and argue that the requirement will unconstitutionally burden the right to vote in the context of the COVID-19 pandemic. But

the requirement to complete the State's request form imposes no more than a modest burden when weighed against the State's legitimate interests in elections administration.

North Carolina law requires that a voter who wishes to vote absentee submit information sufficient to verify the voter's name, address, date of birth, driver's license/ID card/Social Security Number, and signature. N.C. GEN. STAT. § 163-226(b). The State Board of Elections' form contains requests for all of this information and conforms with North Carolina law. And for 2020, voters may request by phone that a blank absentee ballot request form be sent to them. 2020 N.C. Sess. Laws 17. When a voter finishes filling out her absentee ballot request form, she may email, fax, mail, or hand-deliver the form to a county board of elections. 2020 N.C. Sess. Laws 17. In addition, an online version of the request form will be available on 1 September 2020. Bell Decl., ¶ 30.

The plaintiffs do not challenge the underlying requirement that a voter verify certain personal information while requesting an absentee ballot. Instead, they challenge the fact that a request form is required, arguing that the form presents a severe burden because certain voters lack the means to print it. DE 10 at 23.

Notably, however, in recognition of this concern, the State Board of Elections does not require that voters print out the form themselves. Any individual may copy and distribute the official form, as long as it is blank. Therefore, the same organizational plaintiffs who wish to assist with voting can make these request forms available for voters who may not be able to print out the form themselves. In addition, for elections in 2020, voters may request by phone that an absentee ballot request form be sent to them. 2020 N.C. Sess. Laws 17, § 5(a). And the State Board is planning to include a blank form in the

Judicial Voter Guide mailed to every North Carolina household. Bell Dec., ¶ 11. Therefore, the burden on voters to access a printer and print the form for themselves has been minimized, if not eliminated altogether.

Moreover, even during the COVID-19 pandemic, another court has held that the burden imposed by requiring voters to obtain a printout of the State's absentee-ballot request form or fill out the form online and then email, fax, mail, or deliver the request form to a county board of elections is, at most, modest. *See, e.g., League of Women Voters v. LaRose*, No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631, at *20-21 (S.D. Ohio Apr. 3, 2020) (holding that law requiring voters to submit an absentee ballot request form only through mail but allowing the form to be printed or requested online or by phone creates “at most” a modest burden on the right to vote).

In light of these modest burdens, the government's interests in reducing voter confusion by ensuring that all absentee ballot requests comply with North Carolina law and can be processed in a timely fashion are entirely justified. *See League of Women Voters v. LaRose*, 2020 U.S. Dist. LEXIS 91631 at *23 (recognizing as adequate justification the need to properly verify a voter's identity and a voter's signature and sufficient to not allow people to request absentee ballots by phone or online). The State Board's form contains provisions for voters to fill in all of the information required by North Carolina law to receive an absentee ballot. Bell Decl., ¶ 28. The form is also accompanied by instructions that indicate how to submit the form and when a voter may receive assistance and from whom. *Id.*, ¶ 27. Requests received on forms other than those created by the State Board

of Election, as the plaintiffs request, may be invalid—increasing voter confusion and frustration. *Id.*, ¶ 29.

The need to reduce voter confusion and frustration and follow North Carolina law are all important justifications to require that absentee voters fill out the State Board’s form either online or in print and return the form by email, fax, mail, or in-person delivery. These justifications outweigh the modest burden imposed by the State’ absentee-ballot request form.

E. Establishment of Mechanism to Request Absentee Ballots by Phone

As noted above, North Carolina law allows absentee ballot request forms to be requested by phone, for the 2020 general election. The plaintiffs request that the Court go further and require the State Defendants to allow voters to skip the process of making a written ballot request altogether, and instead be able to directly request ballots by phone. DE 31 at 7. As discussed above, the burden placed on an absentee voter to fill out a request form is minimal—particularly when weighed against the State interest in requiring absentee voters to verify certain personal information before ballots are sent to them. Accordingly, the plaintiffs cannot show that the State Defendants’ failure to provide an alternative to modestly burdensome requirements creates an unconstitutional burden. Moreover, requiring the State Defendants to allow absentee ballot requests to be made by phone, on the current record, would impair the State’s interest in verifying voters’ personal information.

As discussed above, the plaintiffs do not challenge the underlying requirement that a voter verify certain personal information before obtaining an absentee ballot. They ask

that voters be able to do so by phone. One of the statutorily required fields on an absentee request form is the signature of the voter or the voter's near relative or verifiable legal guardian. N.C. GEN. STAT. § 163-230.2(a). Allowing ballot requests to be made by phone would not allow for receipt of a relevant signature. Without a signature, the county board is not permitted, under state law, to send an absentee ballot to the voter. *Id.*; Bell Decl., ¶ 36. Without modifying the statutory requirements for absentee ballot requests, ordering the State Defendants to allow absentee ballot requests by phone would force the State Board of Elections and county boards to ignore the signature requirement in state law.

F. Proof of Residency Documents

The plaintiffs also ask this Court to require that election officials accept “any proof of residency document acceptable under the Help America Vote Act (HAVA) as acceptable forms of identification with absentee ballot requests.” DE 31 at 7.

North Carolina differs somewhat from HAVA and requires that an absentee voter include one of the following: the number of the voter's North Carolina driver's license, learner's permit, or provisional license; the number of the voter's special identification card for nonoperators of vehicles; or the last four digits of the voter's social security number. N.C. GEN. STAT. § 163-226(b).

The plaintiffs fail to describe why requiring this information is burdensome to them. Nor is it clear why the COVID-19 pandemic would heighten any burden.

The State Defendants note that Bell has recommended to the North Carolina General Assembly that any HAVA document be accepted as part of an absentee ballot request form, and agree that such a provision would be sound policy. Bell Decl., ¶ 9. However, courts

have denied motions for preliminary injunctions where plaintiffs have argued that requiring proof of residency and proof of voter identification for absentee ballot applications in light of the COVID-19 pandemic are unconstitutional burdens on the right to vote. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 U.S. Dist. LEXIS 48394, *20 (W.D. Wisc. Mar. 20, 2020). The plaintiffs' request for a preliminary injunction on this point should be denied.

G. Limits on Assistance with Absentee Ballots

The plaintiffs also argue that the statutory limits placed on assistance with absentee ballots unduly burden voters by preventing them from receiving assistance to navigate the absentee ballot process. DE 10 at 23-24. But the restrictions on assistance with absentee ballots are a modest burden when weighed against the State's interests in preventing voter fraud.

The State's restrictions on assistance with absentee ballots limit the number of people who are permitted to assist with or mark absentee ballots and ballot requests to: (a) the voter, (b) a close relative or legal guardian, or (for 2020) (c) a member of a multipartisan assistance team trained and authorized by the county board of elections. N.C. GEN. STAT. §§ 163-226.3, -227.2, -230.2; 2020 N.C. Sess. Laws 17. And for voters who need assistance due to blindness, disability, or inability to read or write and there is not a close relative or legal guardian available to assist, they may request any other person to provide assistance in requesting ballots. N.C. GEN. STAT. § 163-230.2(e1). The plaintiffs claim that these restrictions prevent voters from receiving needed assistance.

The restrictions on assistance do not categorically bar assistance—they merely limit the people who may assist a voter. Moreover, these restrictions have been loosened in light of the COVID-19 pandemic. For 2020, a member of a multipartisan assistance team may assist *any* voter with requesting an absentee ballot, returning the request, marking the absentee ballot, and serving as a witness. 2020 N.C. Sess. Laws 17.

While the plaintiffs claim that the restrictions render voters virtually helpless, they have not provided evidence to suggest that a large proportion of voters who need assistance will not be able to receive that assistance from a close relative or legal guardian or a member of a multipartisan team in 2020—with one exception.

The plaintiffs claim that the availability of multipartisan teams is inadequate in certain counties and that, as a result, voters are left without assistance. DE 10 at 24. This concern, however, is speculative because county boards of elections and the State Board of Elections have anticipated the increased need for multipartisan assistance teams this fall and are already taking steps to expand the recruitment and promotion of multipartisan assistance teams by devoting significant additional funding provided under the CARES Act and HAVA for these efforts. 2020 N.C. Sess. Laws 17.

In light of the measures that the State has already taken to mitigate the burden placed on absentee voters needing assistance, the restrictions, which serve an important state interest in preventing voter fraud and increasing confidence in elections, are reasonable.

In 2005, the Commission on Federal Elections Reform, a bipartisan commission, cautioned that “absentee ballots remain the largest source of potential voter fraud Absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home,

at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” Comm’n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005). The Commission went on to explain that states 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.” *Id.* As part of its formal recommendation, the Commission stated: “States and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or elections officials.” *Id.* at 47.

North Carolina’s restrictions on absentee ballot assistance do just that: they reduce the risk of fraud and abuse in absentee voting by prohibiting anyone who is not the voter, a near relative, a legal guardian, the U.S. Postal Service, or elections officials and members of a bipartisan team trained and authorized by the county board of elections from engaging with absentee ballot requests and ballots. 2020 N.C. Sess. Laws 17. The assistance restrictions are part of a larger statutory scheme designed to minimize the chance of fraud. The other aspects of the larger statutory scheme include requiring voters to verify personal information, requiring certifications under penalty of perjury, and prohibiting falsifications of information on the ballots. N.C. GEN. Stat. §§ 163-274, -275.

The reasons for these restrictions are not theoretical. As the plaintiffs note, in the 2018 election in the Ninth Congressional District, a political activist hired by the Republican nominee engaged in a coordinated absentee ballot fraud scheme in which he paid employees to collect absentee ballots from voters and organized employees to fill in

incomplete, unsealed ballots in favor of Republican candidates. This resulted in the results of the election for that contest being invalidated, requiring a special election the following year.

When weighed against the state's interest in promoting confidence in elections and preventing voter fraud, limiting the number of people who can assist with requesting and marking absentee ballots is reasonable and does not unduly burden voters in exercising their right to vote.

The plaintiffs also argue that the limits placed on assistance with absentee ballot request forms violate their rights under the First Amendment to free speech and association. DE 10 at 54.

The State Defendants do not dispute the fact that the organizational plaintiffs and certain individual plaintiffs may benefit from engaging with voters to instruct them on how to fill out absentee ballots. However, the State's legitimate interests in maintaining public confidence in elections and protecting against fraud are compelling and important interests that warrant the restrictions on who can assist with filling out absentee ballot request forms.

The plaintiffs note that the they challenge did not prevent the 2018 absentee ballot fraud scheme described above. No doubt, the perpetrators of the 2018 absentee ballot fraud scheme violated many laws—including the restrictions on assistance with absentee ballots. But the State Defendants are unaware of cases that require statutory schemes to be foolproof to effectuate an important and compelling interest.

The plaintiffs also suggest a number of other laws that the North Carolina General Assembly could have passed in the alternative to address the issue of absentee voter fraud.

DE 10 at 33, 34, 59. These policy differences, however, do not create First Amendment violations. North Carolina's restrictions on assistance with absentee voting mirror independent, bipartisan recommendations, are designed to reduce the incidence of absentee voter fraud, and are viewpoint and content-neutral.

Finally, the plaintiffs argue that the assistance restrictions also violate Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act because the restrictions deny some of the plaintiffs their right to vote. As discussed above, the restrictions do not deny voters assistance altogether. They merely limit the number of people who are permitted to come into contact with absentee ballots and ballot requests to reduce the chance of voter fraud. Because the plaintiffs have failed to show that the ADA/RA plaintiffs are unable to request the assistance of a close relative, legal guardian, or member of a bipartisan assistance team, they have not been denied the franchise.

H. Witness Certification Requirement

The plaintiffs further ask this Court to enjoin enforcement of North Carolina law requiring absentee voters to mark their ballots in the presence of one witness on the ground that it is an undue burden on the right to vote. 2020 N.C. Sess. Laws 17. But they fail to show that this requirement presents a burden sufficient to outweigh the state's legitimate interests.

The plaintiffs claim that the witness requirement does "little to prevent fraud while creating mass disenfranchisement." DE 10 at 32. The State Defendants do not challenge that mass disenfranchisement would constitute a severe—and unconstitutional—burden on

the right to vote. But the plaintiffs have failed to prove that the witness requirement would cause mass disenfranchisement.

The plaintiffs note that there are more than 1.1 million single-member households in North Carolina. DE 10 at 26. There is no evidence in the record, however, of what proportion of these single-member households would be unable to comply with the witness requirement. For example, the statistics provided by the plaintiffs do not indicate whether these individuals intend to vote, whether they regularly interact with individuals outside their households, whether these individuals could obtain the required signature without violating the CDC's social-distancing guidelines by wearing masks and gloves, remaining more than six feet apart, and being physically separated from one another by a window or open doorway. .

The State Defendants agree that it would be prudent as a matter of policy to eliminate the witness requirement. Indeed, Bell suggested to the North Carolina General Assembly that they eliminate the witness requirement for elections in 2020. Bell Decl., ¶ 9. But when weighed against the plaintiffs' failure to prove that the burden placed by a single-witness requirement is severe, the plaintiffs cannot overcome the government's interest in instituting this requirement. Many states' witness requirements for absentee ballots are justified to minimize voter fraud. *See, e.g., Thomas v. Andino*, No. 3:20-cv-01552, 2020 U.S. Dist. LEXIS 90812, at *52 (D.S.C. May 25, 2020); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-00024, 2020 U.S. Dist. LEXIS 79439, at *43 (W.D. Va. May 5, 2020); *Bostelmann*, 2020 U.S. Dist. LEXIS at *62-63.

To be clear, there is very little evidence of voter fraud in North Carolina. However, courts do not necessarily require that the witness requirement significantly advance the state's interests to be justified. While the plaintiffs correctly note that the courts in *Thomas*, *Libertarian Party of Illinois v. Pritzker*, and *League of Women Voters of Virginia* all held that the witness requirement for absentee ballots did not significantly advance the state's interests in preventing voter fraud (DE 10 at 32-34), still other courts have found the opposite—that despite the fact that the challenged requirement does not map closely to the state's reported interests, preventing fraud is a legitimate and strong interest sufficient to uphold the statute's constitutionality. *See Bostelmann*, 2020 U.S. Dist. LEXIS at *64; *see also Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (holding that even though there was no evidence of voter-impersonation fraud in Virginia and that the voter ID law would not prevent any voter-impersonation fraud, the voter ID law could still survive because the state's interest in protecting against voter-impersonation fraud was a sufficiently valid interest).

In light of the plaintiffs' failure to show that the witness requirement presents a significant burden and the Court's preference for granting preliminary injunctions that maintain the status quo rather than create a new one, this Court should deny this request for an injunction. *Pashby v. Delia*, 709 F.3d at 319.

The plaintiffs also argue that the witness requirement presents an unconstitutional condition on the right to vote because it “will force voters to choose between exposing themselves to severe risks to their health and exercising their constitutionally protected

right to vote.” DE 10 at 48. But the “unconstitutional conditions” doctrine does not apply here.

“The unconstitutional conditions doctrine forbids the government from denying or terminating a benefit because the beneficiary has engaged in constitutionally protected activity.” *Petrella v. Brownback*, 787 F.3d 1242, 1265 (10th Cir. 2015). It “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. John’s River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

But the doctrine only applies if the government jeopardizes a constitutionally protected right. *Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011). In this case, the plaintiffs press the idea that the right to self-quarantine is an exercise of the constitutional right to “bodily integrity.” While the right to bodily integrity is undoubtedly constitutionally protected, the right to self-quarantine does not fall within its ambit.

The concept of “personal bodily integrity” is embodied in the “right to be free of unauthorized and unlawful physical abuse by state intrusion.” Violations do not arise from “bad policy or inaction,” but rather only applies to “the most egregious official conduct.” *J.S. ex rel. Simpson v. Thorsen*, 766 F. Supp. 2d 695, 705 (E.D. Va. 2011) (quoting *Waybright v. Frederick Cty. Md. Dept. of Fire & Rescue Svcs.*, 528 F.3d 199, 204 (4th Cir. 2008)). Only intrusions that are “shock the conscience” and “nothing less” rise to violations of personal bodily integrity. *Waybright*, 528 F.3d at 205.

Enforcing the witness requirement does not violate a person’s bodily integrity. The requirement that voters who decline to vote in-person on Election Day and who decline to vote in-person early may vote by absentee ballot in the presence of one witness is not a

government intrusion that shocks the conscience. As explained above, the plaintiffs have failed to prove that this requirement places a substantial burden on voters. Where there is no substantial burden to voters, the witness requirement does not violate a person's bodily integrity. The witness requirement does not require that voters choose between two constitutional rights. Accordingly, the unconstitutional conditions doctrine is inapplicable here.

I. Uniform Hours in Precincts

The plaintiffs also ask this Court to enjoin the requirement that all one-stop voting sites in a county be open during uniform hours and all sites other than the county board office be open from 8:00 a.m. to 7:30 p.m. DE 31 at 5. The requirement for all sites in a county to have uniform hours was first enforced in 2018 and has been in effect since then. The plaintiffs have not established that the COVID-19 pandemic renders the uniform hours requirement an undue burden requiring a preliminary injunction.

The State Defendants acknowledge that the uniform hours requirement may reduce the flexibility of county boards of elections to respond to exigencies that may occur in light of the COVID-19 pandemic. This is why Bell recommended that the North Carolina General Assembly consider waiving the uniform hours requirement, to give county boards of elections flexibility to determine hours as each polling location may be affected differently—and may need to respond differently—to the COVID-19 pandemic. Bell Decl., ¶ 9.

While the plaintiffs note that since the requirement's implementation in 2018, 43 counties had to reduce the number of one-stop sites in the 2018 general election compared

to 2015 and more than two-thirds of counties were forced to reduce weekend hours, DE 10 at 41, the plaintiffs do not explain why the COVID-19 pandemic would change the burden of this requirement. The plaintiffs have not provided information sufficient to understand the nature of the burdens to voters resulting from the confluence of the COVID-19 pandemic and uniform one-stop hours. Because the plaintiffs bear the burden of showing that voters are unduly burdened sufficient to deny them their First and Fourteenth Amendment rights, their failure to do so requires that this Court deny their request to enjoin this requirement.

J. Residential Requirements for Pollworkers

The plaintiffs next ask this Court to enjoin the requirement that at least one precinct assistant be a registered voter of the precinct. DE 31 at 6. The plaintiffs have not established that the residential requirement unduly burdens voters.

The plaintiffs claim that the COVID-19 pandemic, combined with the enforcement of the State's residential requirements for pollworkers, will result in the closure of polling locations in the general election. The State Defendants agree that the law requiring that a majority of pollworkers to reside in the precinct (N.C. GEN. STAT. § 163-41(c)) would have curtailed the flexibility of county boards of elections to staff precincts and would have resulted in polling-place closures. In fact, Bell recommended to the North Carolina General Assembly that they move to eliminate the majority-residential requirement for the 2020 elections. Bell Decl., ¶ 12. The General Assembly subsequently amended this requirement—for elections in 2020—to require only that one precinct assistant is a resident of the precinct. 2020 N.C. Sess. Laws 17.

Since the change in law, however, the State Defendants have taken additional steps to ensure that polling places will remain open and unaffected by the COVID-19 pandemic. As recently as June 10, 2020, Bell announced her commitment to county boards of elections to maintain Election Day precincts as they are and avoid precinct mergers whenever possible. Bell Decl., ¶ 12. For the general election, Bell has instructed county boards of elections to keep as many precincts open as possible to prevent long lines and to allow for greater social distancing so that, if a polling place needs to be shut down because of a COVID-19 outbreak, the impact of this closure will be reduced by the widespread availability of other open polling locations. Bell Decl., ¶ 12.

The plaintiffs' request, therefore, appears to be moot. The plaintiffs press this Court to enjoin this requirement anyway, but fail to show why the new requirement—that only one precinct assistant live in the precinct—places an undue burden on voters. In light of the plaintiffs' failure to show burden, their request to enjoin the legislative accommodation in light of the COVID-19 pandemic should be denied.

K. Establishment of Contactless Drop Boxes for Absentee Ballots

The plaintiffs also ask this Court for a mandatory injunction that would require the State Defendants to establish contactless drop boxes for absentee ballots around the State. The plaintiffs have failed to meet the heightened standard required for the Court to issue a mandatory preliminary injunction: they have not proven that the lack of contactless drop boxes presents an undue burden to voters and their request that this Court intervene to short-circuit the State Board of Elections's expertise and authority to exercise discretion to address the COVID-19 pandemic overlooks these legitimate state interests.

The State Defendants do not challenge that establishing contactless drop boxes would allow voters to deposit ballots while maintaining social distancing and may reduce the strain on North Carolina's mail infrastructure. DE 10 at 27. But the plaintiffs have not established that such measures are a constitutional requirement.

The plaintiffs' only factual assertion in support of this claim is that individual voters will have to rely on the U.S. Postal Service to submit their ballots. DE 10 at 27. They have provided no evidence that the U.S. Postal Service is incapable of delivering absentee ballots to North Carolina county boards of elections in the days and weeks leading up to the general election. Nor have the plaintiffs pointed to any cases that suggest that, as a legal matter, failure to provide contactless drop boxes is a per se violation of an absentee voter's constitutional rights. Instead, the plaintiffs rely on speculation that the U.S. Postal Service will not be able to accommodate the volume of absentee ballots expected and that North Carolina can "easily implement" a drop boxes program. DE 10 at 27. This speculation does not give rise to constitutional burden.

Moreover, asking this Court to intervene in policy matters committed to the State Board of Elections steps on the authority and flexibility of the State's elections administration officials to respond to crises as they occur. The establishment of drop boxes is a policy consideration that falls squarely within the authority of the State's elections administration officials—there is no statute or law requiring the use of drop boxes. The State Board of Elections has been engaged since March 2020 in an ongoing process of determining the State Board and county boards of elections' response to the COVID-19 pandemic. Bell Decl., ¶¶ 5-6. The response has included rescheduling the Republican

second primary in Congressional District 11, suspending certain requirements, extending certain deadlines, requiring pollworkers and early voting workers to wear personal protective equipment, providing masks to voters, providing sufficient hand sanitizer and cleaning solutions and single-use pens at voting sites, implementing social distancing requirements, and ensuring that there are sufficient polling places and that these polling places are adequately staffed on Election Day. Bell Decl., ¶¶ 8-17. Among the responses to the COVID-19 pandemic that the Executive Director implemented was requiring county board offices that were closed to provide a secure lockbox for voters to deposit election-related forms. Bell Decl., ¶ 8.

These responses show that the State Board of Elections and Executive Director are monitoring the situation closely and are responding appropriately to crises as they develop. The implementation of county-board lockboxes shows that the Executive Director is aware that drop boxes may be useful tools to deposit voter material and may indeed be considering implementing dropboxes for the general election. There are a number of considerations that the Executive Director needs to take into account before implementing any alternative procedures, including cost and potential for voter confusion, and this Court should not restrict the Executive Director's ability to make these decisions using her expertise in elections administration—particularly in light of the fact that the plaintiffs have failed to demonstrate that the lack of dropboxes significantly burdens the franchise.

L. Establishment of Mechanism to Cure Absentee Ballot Requests and Absentee Ballots

The plaintiffs further request this Court to order the State Defendants to institute a mechanism for voters to cure deficiencies in ballot requests and marked ballots. DE 31 at 7. Like their request for an injunction establishing drop boxes, the plaintiffs have also failed to show a sufficient burden on their right to vote weighed against significant discretionary interests of the State Board of Elections to manage county boards and establish protocols.

The plaintiffs assert that in the March 2020 primary, nearly 15% of submitted absentee ballots were rejected. DE 10 at 36. From this statistic, the plaintiffs conclude that the lack of a standardized curative process is the reason these ballots were rejected. But they provide no evidence to suggest that this is true. The plaintiffs have failed to show that the lack of a standardized curative process places an undue burden on voters' rights.

But even if the plaintiffs could successfully prove that the lack of a standardized curative process burdened the right to vote, the state's interests in maintaining flexibility to adjust to crises in real-time present sufficient justification. Like issuing contactless drop boxes, creating a standardized procedure to cure absentee ballots is under the administrative purview of the State Board of Elections. The plaintiffs' request that this Court intervene to interrupt the State Board's deliberations and limit the flexibility with which the State Board might respond to changing circumstances on the ground impinges on important state interests in elections administration. Moreover, there is no need for the Court to entangle itself in these discretionary decisions at this time—indeed, the State

Board is already planning on providing standardized guidance on assisting voters in curing defects in absentee ballots. Bell Decl., ¶ 17. This guidance is forthcoming and will be in place well before county boards will need to implement these procedures. *Id.*

This guidance also obviates any need for an injunction to address due-process concerns that the plaintiffs might have. The plaintiffs claim that absentee voters are not provided notice of or opportunity to cure defects in their absentee request forms or the ballots themselves. DE 10 at 61. The State Board's guidance will provide sufficient information to county boards of elections and the public to set standards to cure defects created during absentee voting and educate the public on how to avoid and cure the defects.

M. Require Voters to Be Able to Use Federal Write-In Absentee Ballots In Lieu of Absentee Ballots

The plaintiffs ask this Court to require that voters be able to use federal write-in absentee ballots (FWAB) in lieu of absentee ballots, should their timely requested absentee ballot not arrive in sufficient time to ensure that the ballot will be counted. DE 10 at 7.

The State Defendants agree that failure to receive a timely requested absentee ballot would present severe burdens to the right to vote. Should absentee voters experience difficulty in receiving an absentee ballot in time, the resulting disenfranchisement should be remedied.

But this is exactly why this Court should not intervene to issue an injunction directing the remedy. Rather, the State Board of Elections and its Executive Director should be allowed the opportunity to utilize their expertise to prevent disenfranchisement in ways that are administratively feasible.

For example, permitting civilian voters to vote by FWAB poses a number of significant administrative concerns. Bell Decl., ¶ 37. The procedure for processing civilian absentee ballots is semi-automated and increases accuracy because the official ballot that a civilian voter receives can be tabulated by machine. Bell Decl., ¶ 37. By contrast, voters who use a FWAB type or handwrite their selections. Bell Decl., ¶ 38. Accordingly, once a FWAB is returned to a board of elections, a bipartisan team must contact the voter and ensure that each selection that the voter made is properly marked on an official ballot. Bell Decl., ¶ 38. This procedure is far more time-consuming. A large increase in the number of FWABs returned, particularly in light of the plaintiffs' concerns about the ability for the U.S. Postal Service to accommodate all of the anticipated absentee ballots this fall, would be too burdensome for county boards of elections to prepare for, implement, or fund. Bell Decl., ¶ 38.

Requiring FWABs to be available for civilian voters would upend the important governmental interests in ensuring the accuracy of vote counts and fidelity to every voter's selections. Moreover, it is simply unworkable. This Court should not take up the plaintiffs' invitation to fashion a remedy using such a blunt instrument.

N. Monitoring Precinct Consolidation

The plaintiffs also ask this Court for a mandatory injunction to establish "a more accessible, centralized way in which voters and advocates can monitor precinct consolidation." DE 31 at 7. But the plaintiffs have not shown that the procedures currently in place are insufficient to educate voters on polling-place relocation.

The State Defendants do not dispute that voters should be informed about polling-place relocation in a timely fashion. Where precincts need to be consolidated or polling places need to be relocated for the general election, county boards of elections will mail notice to all affected voters at least 30 days before the election. N.C. GEN. STAT. § 163-128(a). Where a one-stop site or polling place needs to be closed or relocated while voting is already ongoing, notice will be posted to the door and voters will be directed to a new voting location both by notice and by a precinct official. Bell Decl., ¶ 16. Each voting place is also required to have an emergency backup plan if voting cannot continue in the usual location and voters are notified of these plans if they need to be activated. *Id.*

The plaintiffs have not explained, however, why these methods of voter education cause such a burden as to render them constitutionally insufficient. They have not presented evidence to suggest that voters have, in the past, not been properly informed of any changes to precincts and polling places or that changes to precincts and polling places have caused voters to not be able to vote. The plaintiffs' request for an injunction here is unnecessary—the State Defendants are already informing voters in a timely fashion of changes to precincts or polling places.

O. Voter Education

Finally, the plaintiffs ask for a “remedial plan to educate voters regarding their options to register to vote and obtain and cast a ballot.” DE 31 at 8. But, like their request for an injunction that commands the State Defendants to refrain from violating constitutional or statutory rights, the plaintiffs' request for a plan to educate voters is both unnecessary and unspecific.

The State Board of Elections is already engaged in a number of voter-education activities, specifically targeted to the process of registering, obtaining, and casting a ballot. For example, the State Board is planning on sending a Judicial Voter Guide to every North Carolina household that includes a blank absentee request form and a link to the State's online absentee request. Bell Decl., ¶ 11. In addition the guide will inform voters about recent changes to the law and measures that are being taken to ensure voter safety for in-person voting. *Id.* The State Board will continue to educate voters about exercising the franchise throughout the summer and heading to Election Day. Accordingly, there is no need for this Court to intervene to command that the State Defendants do what they are already doing.

Moreover, the plaintiffs' request is too unspecific to give the State Defendants notice of what is required of them—particularly when they are already engaged in the very activities the plaintiffs seek to mandate.

The plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their claims.

II. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.

The second factor of the *Winter* test requires that plaintiffs demonstrate they will suffer irreparable harm if an injunction is not issued. *Winter*, 555 U.S. at 20. In *Winter*, the Supreme Court noted its

frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction.

Los Angeles v. Lyons, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974); see also 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948.1, p. 139 (2d ed. 1995) [] (applicant must demonstrate that in the absence of a preliminary injunction, “the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered”); *id.*, at 154-155 (“A preliminary injunction will not be issued simply to prevent the possibility of some remote future injury”). Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*).

Winter, 555 U.S. at 22.

Plaintiffs have attempted to meet this standard by noting that “this fall the pandemic’s transmission dynamics and the corresponding risk to voters are highly likely to be equal to or worse than the current situation.” [*Plaintiffs’ Memorandum in Support of Their Motion for Preliminary Injunction and Request to Expedite*, DE 10 at 72.] Plaintiffs also assert the importance of voting rights. The State defendants agree that voting rights are of exceptional importance. What plaintiffs fail to take into account, however, is the ability of the State of North Carolina in general, and the State Board defendants in particular, to address the challenges posed by the COVID-19 pandemic. As a result, the irreparable harm that plaintiffs forecast is not assured, but rather is speculative.

As noted *supra*, plaintiffs amended their complaint twice in the four weeks following the original filing of the complaint. The Second Amended Complaint was prompted by the enactment of 2020 N.C. Sess. Laws 17, which mooted a number of plaintiffs’ original claims and altered other claims. 2020 N.C. Sess. Laws 17 demonstrates the intent of the State to respond to the pandemic as needed to ensure that the 2020 general

election proceeds in an orderly fashion and that all voters are able to exercise the franchise.

Likewise, Bell and the State Board as a whole have demonstrated a willingness and determination to exercise her emergency authority appropriately to ensure that elections proceed and that voters are able to vote safely and with confidence. Bell postponed the Republican second primary in CD 11 in order to ensure that it could be held safely and administered effectively, and she temporarily suspended or delayed various deadlines associated with that primary. (Bell Decl., ¶ 8.) She also directed county boards of elections to provide secure lock-boxes in which election related forms could be left if the county board offices were closed. (Bell Decl., ¶ 8.) She is now working with county boards of elections to ensure that voting sites are able to safely accommodate all who choose to vote in person, both in terms of the number of people who might vote there and in terms of poll workers needed. She and the State Board are also taking steps to make sure that mail-in absentee ballots will be available to any voter who wants one. They are including a blank absentee ballot request forms in the Judicial Voter Guide that will be sent to every household in North Carolina. (Bell Decl., ¶ 11.) They will continue to monitor the challenges posed by the pandemic and will respond appropriately. (Bell Decl., ¶ 17.)

It is clear then, that while North Carolinians will indeed still be dealing with the pandemic in November, the State defendants are able to respond in appropriate ways and have demonstrated their determination to do so. Plaintiffs' argument that they will suffer irreparable harm without an injunction is predicated on an assumption that the State generally, and the Bell in particular, will ignore the challenges presented and do nothing to ensure the election can be held safely and with full participation by all eligible voters.

There is no basis for that assumption. For this reason, plaintiffs have failed to show that it is “likely” that they will suffer irreparable harm absent an injunction. *Winter*, 555 U.S. at 22. At most, irreparable harm is only possible or speculative—a standard explicitly rejected by the Supreme Court in *Winter*. The motion for preliminary injunction should, therefore, be denied.

III. THE EQUITIES TO THE PARTIES AND THE PUBLIC INTEREST WEIGH AGAINST AN INJUNCTION.

The final two *Winter* factors require plaintiffs to demonstrate that the equities tip in their favor and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. In cases involving significant public interest, which unquestionably includes cases involving the conduct of elections, courts may “consider the balance of the equities and the public interest factors together.” As the Fourth Circuit has explained:

Even if Plaintiffs are likely to suffer irreparable harm in the absence of a preliminary injunction, we still must determine that the balance of the equities tips in their favor, “pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Weinberger v. Romero—Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982). This is because “courts of equity may go to greater lengths to give ‘relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.’” *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 826 (4th Cir. 2004) (quoting *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552, 57 S. Ct. 592, 81 L. Ed. 789 (1937)).

Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 602 (4th Cir. 2017).

Plaintiffs summarily assert that the equities tip in their favor simply because there is a pandemic. They also summarily assert that an injunction is in the public interest “as non-parties to this action will stand to benefit from the requested injunction.” [*Plaintiffs’ Memorandum in Support of Their Motion for Preliminary Injunction and Request to*

Expedite, DE 10 at 78.]

However, as the Supreme Court has stated, “any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Moreover, the State defendants, as those charged with enforcement of North Carolina’s election laws, represent the public interest in this case, for the laws themselves reflect the public’s interest. *See Jackson v. Leake*, 476 F. Supp. 2d 515, 530 (E.D.N.C. 2006).

The State defendants have submitted declarations that demonstrate the impracticability of some of the measures plaintiffs seek, and how they are contrary to the public interest. For example, Bell has described how changes to the absentee ballot requirements—including eliminating the witness requirement or instructions as to who may assist the voter—at this stage could result in absentee ballots not being ready in time for the absentee voting period. (Bell Decl., ¶ 19.) This could be particularly problematic given the assumption that demand for mail-in absentee ballots will be higher this year than in previous years; if that assumption proves true, it will be even more important for those absentee ballots and the envelopes in which to mail them to be ready prior to the beginning of the absentee voting period.

Likewise, extension of the voter registration deadline to the last Saturday before Election Day would bypass measures designed to verify voters’ residence. (Bell Decl., ¶ 21.) Perhaps more problematic, voters who register after the 25-day deadline would not appear on the pollbooks for early voting and would have to be asked to register again,

which could cause confusion and uncertainty. (Bell Decl., ¶ 22.) And the influx of registration forms that would need to be manually scanned into the Statewide Election Information Management System (“SEIMS”)—98,207 registration forms were received in the five days prior to the deadline in 2016—would need to be processed at the same time that elections officials are conducting early voting, and in some counties would need to be done in time for the pollbook to be printed by Election Day. (Bell Decl., ¶ 23.) Plaintiffs’ request that the Court permit the use of the Federal Write-in Absentee Ballot (“FWAB”) presents a similar challenge. FWABs must be duplicated to a ballot that can be tabulated by a machine, which involves a bipartisan team working to accurately duplicate the FWAB to a machine-readable ballot. FWABs are currently allowed for military and overseas voters, and county boards have planned for the bipartisan teams to handle those ballots. However, county boards have not allocated funds or other resources for a significant increase in FWABs. (Bell Decl., ¶ 38.)

Confusion could likewise result if absentee ballot requests are allowed on forms other than those prepared by the State Board. The law requires certain information on the request form. *See* N.C. GEN. STAT. § 163-230.2(a). There is no way to guarantee that requests not on the State Board’s form will include the necessary information. This could lead to delays in fulfilling requests for absentee ballots, or rejections of those requests. (Bell Decl., ¶ 27-28.)

Finally, much of the relief requested by plaintiffs presents logistical challenges that may be insurmountable. For example, the Plaintiffs’ claim that the burden on DHHS defendants to expand online voter registration is “de minimus” is not accurate. (Amended

Complaint ¶ 89). As shown through the declarations submitted by DHHS, the DHHS defendants are not equipped to create an online voter registration by the November 2020 election. Additionally, DHHS cannot address, and Plaintiffs fail to acknowledge, that the covered transactions that require voter registration under the NVRA are administered by local county DSS or local WIC agencies, not the Division of Public Health/WIC or the State Division of Social Services. (Declarations of Tonya L. Prince ¶ 4, and Mary Anne Burghardt ¶ 5) Those local agencies are not parties to this matter. The Plaintiffs do not address how local county DSS offices or local WIC agencies computer systems or websites would be integrated with their proposed expanded online voter registration. The Division of Public Health/WIC and Division of Services for the Blind do not even have a client-facing online portal. (See Exh 5, Declaration of Cynthia Speight and Declaration of Mary Anne Burghardt) Even NC FAST, which has a client-facing portal in ePASS, would not be able to create an online voter registration until after the November 2020 election. (See Declaration of Tonya L. Prince)

Contrary to the Plaintiffs' assertion, none of these agencies possesses "wet-ink" signatures (ink on paper) as that term is commonly defined. (Declarations of Tonya L. Prince ¶ 8, Mary Anne Burghardt ¶ 11, and Cynthia Speight ¶ 8) The agencies would also have to coordinate and establish agreements with the State Board of Elections to govern this process. Additionally, DHHS has confidentiality requirements that do not allow it to disclose beneficiary information to third parties. These online voter registration systems would have to be tested to ensure that they are working correctly before implementing them for an election.

Finally, none of these agencies have funding to institute these changes. As the DMV defendants noted, it took them nearly a year to implement its stand-alone voter registration portal and the DMV already had a client facing online portal. (Jessup Declaration ¶¶ 7, 11) NCSBE further supports that it is not possible to create online voter registration through DHHS by the 2020 election. (Bell Declaration ¶¶ 28, 29) Accordingly, asking the DHHS defendants to implement a new system of voter registration without funding and while combating the COVID-19 pandemic in less than four months is not possible.

Likewise, requiring drop-boxes at county board offices or other locations presents challenges of procurement, both of the drop-boxes themselves and also of the land on which to put them. (Bell Decl., ¶ 35.)

In summary, the public interest is that all eligible persons be able to vote in an election that is orderly and free of confusion, and in which the public can have justified confidence. The laws that plaintiffs challenge, including laws recently enacted or amended by the General Assembly, reflect those interests. North Carolina's election laws also provide mechanisms that enable the State Board and its Executive Director to respond as necessary and appropriate to challenges presented by catastrophes and natural disasters, including pandemics like COVID-19.

By asking the Court not only to enjoin the enforcement of certain laws but also to affirmatively order new election procedures, they seek to have the Court usurp the roles of the officials charged with executing North Carolina's election laws—officials to whom North Carolina law gives the ability to respond appropriately to the challenges presented by COVID-19. The balance of the equities and the public interest both lean heavily to

denying the relief sought by plaintiffs.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for a preliminary injunction should be denied.

This the 26th day of June, 2020.

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1) and the Order entered by the Court on 11 June 2020 [DE 21], the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 12,938 words as measured by Microsoft Word.

This the 26th day of June, 2020.

/s/ Alexander McC. Peters
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Chief Deputy Attorney General